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No. 17057

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KIT MANUFACTURING COMPANY, RESPONDENT

On Petition for Enforcement of An Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STUART ROTHMAN,
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In the United States Court of Appeals for the Ninth Circuit

No. 10507

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KIT MANUFACTURING COMPANY, RESPONDENT

On Petition for Enforcement of An Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This proceeding is before the Court on petition of the National Labor Relations Board for enforcement of its order issued against respondent Kit Manufacturing Company on April 27, 1960, pursuant to Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C., Secs. 151, *et seq.*).[1] The Board's decision

[1] The relevant statutory provisions of the Act are printed in Appendix A *infra*, p. 18.

and order (R. 45-50),[2] are reported at 127 NLRB No. 62. This court has jurisdiction under Section 10 (e) of the Act, the unfair labor practices having occurred at respondent's plant in Caldwell, Idaho, where respondent is engaged in the manufacture and interstate sale of trailers and mobile homes (R. 11-12; 49).

STATEMENT OF THE CASE

I. The Board's findings of fact

The Board found that respondent violated Section 8 (a) (3) and (1) of the Act by discharging employee Elsworth Jordon, because of his union activities. The Board also found that respondent violated Section 8 (a) (1) by threatening employees with economic reprisals if they engaged in union activities or voted for a union, and by promising and instituting benefits for employees in return for rejecting a union. The subsidiary facts upon which the Board's findings rest are summarized as follows:

A. *Background*

Shortly after the Company began operations in November 1958, several unions, including the United Steelworkers of America, AFL-CIO (herein called the Union), commenced organizing its employees (R. 12; 86-87, 96). Pursuant to a representation petition filed by the Union on January 19, 1959, the

[2] References to portions of the printed record are designated "R". Whenever a semicolon appears, the references preceding it are to the Board's findings; those following are to the supporting evidence.

Board conducted an election among the employees on June 4, 1959, with indecisive results which required the holding of a run-off election on June 24, 1959 (R. 12; 96, 89, 91-93). On the objection that respondent had illegally interfered with the runoff election, the Board, subsequent to the hearing herein, set the election aside and ordered that a second runoff election be held (R. 12-13; 96).

B. *The unfair labor practices*

1. *The Company interferes with the organizational efforts*

When employee Elsworth Jordon reported for his first day at work on February 2, 1959, Plant Manager Skinner warned him that he would be "blackballed" if he "had anything to do with any Union" (R. 16; 60-61). Skinner then stated that "he didn't want [Jordon] to attend . . . union meetings" and that, although he was not directing Jordon to oppose a union, "it would help if [Jordon] talked against the Unions." (R. 16; 61).

During February and March 1959, Plant Manager Skinner held a series of employee meetings in which he expressed respondent's opposition to unions (R. 16-17; 99, 119). In a March 1959 meeting, Skinner summoned the entire finishing crew into his office and told them that "if the Union [came] in, [respondent's plant] would be closed and nobody would have a job" (R. 16; 80-81, 83-84). Skinner further stated to the assembled crew, which included female employees, that "if the Union [came] in . . . he would take and dismiss the women . . . that he couldn't afford to pay women Union scale for a man's work" (R. 16; 81, 83).

The Union usually met in a private room adjoining a local cafe known as the Stringbusters Lounge (R. 15; 76-77, 84, 58, 59-60, 63, 82). Plant Manager Skinner frequented the same cafe and he knew that the Union's meetings were being conducted on the premises (R. 30; 82-83, 84, 109, 118, 58, 60, 63-64, 77, 81, 87-88). After the meetings ended, he habitually engaged employees in disputes as to the merits of unions (*Ibid.*).

On March 17, 1959, as employee Donald Jessen left a Union meeting he encountered Plant Manager Skinner in the public portion of the Stringbusters Lounge (R. 17; 84, 76, 63). Skinner asked Jessen why he favored a union and when Jessen explained that he believed a union would result in more favorable wages and working conditions for employees, Skinner replied, "If you'll string along with me, I can do more for you than any union . . . I know your happy making $1.45 an hour . . . but if you string along out here with me and help us, we'll help you . . . You won't be making $1.45, you'll be beating that" (*Ibid.*).

2. *The Company interferes with the union elections*

A week before the union election scheduled for June 4, 1959, Plant Manager Skinner assembled twelve employees in his office, instructed them not to attend union meetings, and repeated the threat to discharge the female employees if the Union forced the Company to "pay [them] men's wages" (R. 17-18; 89-90). He further stated "that he would know who voted" for the union and that "he would let

[the employees] go . . . before he would pay Union wages" (R. 18; 90). Skinner also mentioned for the first time the possibility of instituting a group insurance plan for employees, stating that respondent "had been trying to get insurance for [employees] at the plant here . . . it would probably be a year but he would work on it and see if he couldn't get it sooner" (R. 18; 90, 92).

On June 3, 1959, one day before the first election, Plant Manager Skinner spoke to a group of nine or ten employees whom he had ordered to report to his office (R. 18; 93-94, 90-91). Skinner advised the group that "the election was coming up and there had been talk about Unions, different Unions, and they promised [employees] pay raises . . . and various other inducements" but that "he could tell [the employees] here and now that no outside bargaining agents could dictate . . . what the company would pay or do . . ." (R. 18-10; 93-94). Skinner also remarked that the Company "would not tolerate a Union and . . . would dismiss the entire crew if they went Union and start with a new crew" (R. 19; 96, 94). He forewarned the employees that "[i]f you vote Union, you can be dismissed from the company for voting Union." (R. 19; 94). Skinner again referred to the insurance plan for employees and reiterated that the Company "couldn't afford to pay for the plan in less than a year" (*Ibid.*).

Three weeks later, on the morning of the first runoff election, Plant Manager Skinner assembled fifteen employees in his office and announced that the Company was installing the aforementioned insur-

ance plan immediately (R. 19; 91-92, 100, 120, *infra*, p. 19).[3] After he explained the plan and extolled its advantages at length, Skinner proceeded to discuss the impending run-off election (R. 19; *infra*, pp. 19-20). He urged the employees to "vote for the plant and not for the Unions" and to "stay with the plant, and things would be all right (R. 19; *infra*, p. 20).

3. *The discharge of Jordon*

Jordon had been an active Union adherent at his previous job in a nearby plant which was also being organized (R. 15, 29; 56-57). On February 1, 1959, shortly after he had resigned his prior position, Jordon met Plant Manager Skinner in the public part of the Stringbusters Lounge following a Union meeting which he had attended (R. 15; 57-58). At that time, Skinner offered Jordon a job as a maintenance man and promised him a 30 cent an hour increase in pay in three weeks (R. 29; 60-61, 103). When Jordon accepted, Skinner told him to report for work the next morning (*ibid.*). As already noted, *supra*, p. 3, upon Jordan's arrival at work on February 2, 1959, Skinner warned him that if he had anything to do with the Union he would be "blackballed". Skinner, at the same time, specifically directed Jordon not to attend any Union meetings (R. 29-30; 61).

For six weeks Jordon adhered to Skinner's instructions and did not attend any Union meetings. When, however, he pressed Skinner for the promised wage

[3] Portions of the transcript of testimony inadvertently omitted from the printed record are set forth in full in Appendix B, *infra*, pp. 19-21.

increase and was refused, early in March, 1959, Jordon's interest in the Union revived (R. 30; 61-62, 76, 81). Thereafter, he attended three successive weekly Union meetings on March 17, 24, and 31, 1959 (R. 30; 62-64, 81, 76). Skinner was present in the Stringbusters Lounge on the night of the March 17 meeting and he spoke to Jordon "after the meeting broke up" (R. 30; 62-64, 81). Jordon also saw Skinner in the Stringbusters Lounge following the March 31 Union meeting but they did not speak to each other on that occasion (R. 30; 64).

Shortly after Jordon was hired, his immediate superior, Forman Lang, informed him that he was progressing satisfactorily, and Plant Manager Skinner also advised him that he "was doing a pretty good job" and to "keep it up" (R. 33; 64-65).

On the morning of April 1, 1959, in accordance with respondent's instructions to report intended absences, Jordon telephoned the plant and obtained the permission of his immediate supervisor, Foreman Lang, to remain at home to treat a foot infection (R. 31; 66, 73-74, 77, 64). Foreman Lang notified Plant Manager Skinner of Jordon's contemplated absence (R. 31; 66, 73, 115). The next day, April 2, 1959, his foot condition unimproved, Jordon visited a doctor; however, he again advised his superiors that he would be unable to be at work (R. 31; 67, 73, 78). Later that day, Jordon saw an advertisement in the local newspaper indicating that the Company was seeking another man to replace him (R. 32; 68-69, 134, 112-114). When Jordon appeared at the plant the same day to question Company officials about

the advertisement, Plant Manager Skinner informed him that he had been discharged (R. 32; 69-71, 78, 111-112). Previously, Jordon had never been warned about the possibility of his being discharged, except for Skinner's threat, *supra*, p. 3, nor was his work ever criticized (R. 33; 65, 118).

II. The Board's Conclusions of Law and Order [4]

On the foregoing facts, the Board found that by threatening employees with discharge if they engaged in union activities or voted in favor of a union, by threatening to shut down its plant and replace the entire crew if the employees organized, by threatening to dismiss the female employees and substitute male employees should the employees accept a union, by promising an employee a pay increase as a reward for rejecting a union and by precipitously installing the insurance plan on the day of and prior to the run-off election for the purpose of inducing the employees to vote against a union in the election, respondent interfered with, restrained and coerced the employees in the exercise of their rights under Section 7, thereby violating Section 8 (a) (1) of the Act (R. 20-22, 45-46). The Board also concluded that respondent violated Section 8 (a) (3) and (1)

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[4] Upon the motion of the General Counsel at the hearing, the Trial Examiner, with the Board's subsequent approval, dismissed the complaint with respect to the non-litigated discharge of three other employees who failed to appear at the hearing (R. 48, 11, n. 1; 5, 97). The Board also concluded that respondent had not discriminatorily discharged a fourth employee (R. 48, 15).

of the Act by discharging Jordon because of his union activities (R. 38, 45-46).[5] The Board's reasons for rejecting respondent's claim that it discharged Jordon because he was an unsatisfactory employee in several respects are discussed at pp. 14-16, *infra*.

The Board's order (R. 46-48) requires respondent to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing the employees in the exercise of their rights under Section 7 of the Act. Affirmatively, the order directs respondent to reinstate Jordon with back pay and to post appropriate notices.

ARGUMENT

I. Substantial Evidence Supports the Board's Findings That Respondent Interfered With, Restrained and Coerced Its Employees In the Exercise of Their Organizational Rights In Violation of Section 8 (a) (1) of the Act

As set forth above, pp. 3-6, the record establishes that respondent engaged in vigorous efforts to defeat the unionizing of its employees. Through its plant manager, Skinner, respondent convened captive meetings of employees in which it ordered the employees to abandon their union activities under a threat of discharge, threatened to close its plant if the employees unionized, threatened to replace female employees should a union be accepted, and on two occasions immediately preceeding a representation elec-

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[5] The Board found that Jordan's discharge was not violative of Section 8 (a) (4) of the Act (R. 39, 45-46).

tion threatened to discharge those employees voting for a union. In addition, respondent warned an employee on his first day of work not to engage in union activities or he would be "blackballed", and promised another employee a pay increase for rejecting the Union. Finally, respondent strategically timed the announcement of the insurance plan for the employees to coincide with the critical run-off election, and at the same time urged the employees to vote against a union. The installing of the plan on the very day of the run-off election can be explained only as a last minute improvement in working conditions, designed to frustrate the employees' organizing efforts.[6] That the use of such tactics limits employees' organizational rights and, consequently, violates Section 8 (a) (1) of the Act, is too well settled to require discussion.[7]

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[6] Respondent's claim that it had been working on the plan since November 1958, cannot be reconciled with the fact that twice shortly before the election employees were advised that such a plan was not in the offing for at least one year, and no asserted urgency compelled respondent to institute the plan in advance of the opening of the polls on the day of the election (R. 21-22; 90, 92, 100-101).

[7] See, for example, *Medo Photo Corp.* v. *N. L. R. B.*, 321 U. S. 678, 683-684; *N. L. R. B.* v. *Polson Logging Company*, 136 F. 2d 314 (C. A. 9); *N. L. R. B.* v. *Lettie Lee, Inc.*, 140 F. 2d 243, 245-247 (C. A. 9); *N. L. R. B.* v. *Grand Central Aircraft Co., Inc.*, 103 NLRB 1114, 1153-1155, enforced 216 F. 2d 572 (C. A. 9); *N. L. R. B.* v. *Radcliffe*, 211 F. 2d 309, 310-311, 316 (C. A. 9), certiorari denied, 348 U. S. 833; *N. L. R. B.* v. *Howell Chevrolet Co.*, 204 F. 2d 79, 83-85 (C. A. 9), affirmed, 346 U. S. 482; *N. L. R. B.* v. *Pacific Moulded Products Co.*, 206 F. 2d 409 (C. A. 9), certiorari denied, 346 U. S. 938; *N. L. R. B.* v. *Parma Water Lifter*

The Board's determination that respondent violated Section 8 (a) (1) of the Act rests on facts, found by the Trial Examiner and adopted by the Board, which respondent has substantially failed to deny or refute. Respondent suggests that Skinner's coercive statements were prompted by personal convictions and honest fears that the advent of a union would increase costs and might result in a plant shut down. Assuming that this was so, the Board could nevertheless properly conclude, especially in view of the manner and extent of respondent's unlawful interference during the same period, that Skinner's statements were nevertheless threats rather than mere expressions of personal views or economic predictions. *N. L. R. B.* v. *New England Upholstery Co.*, 268 F. 2d 590, 592 (C. A. 1). Compare *N. L. R. B.* v. *Hoppes Mfg. Co.*, 170 F. 2d 962, 964 (C. A. 6).

II. Substantial Evidence On the Record As a Whole Supports the Board's Finding That Respondent Discharged Employee Jordon In Violation of Section 8 (a) (3) and (1) of the Act

As we have already shown, respondent, through its plant manager, resorted to an assortment of illegal measures, including threats of discharge, in order to defeat a union among its employees. Indeed, its anti-union bent was levelled directly at Jordon on the very

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Co., 211 F. 2d 258, 261-263 (C. A. 9), certiorari denied, 348 U. S. 829; *N. L. R. B.* v. *W. T. Grant Co.*, 199 F. 2d 711, 712 (C. A. 9), certiorari denied, 344 U. S. 928; *N. L. R. B.* v. *West Coast Casket Co., Inc.*, 205 F. 2d 902, 904-905 (C. A. 9); *N. L. R. B.* v. *State Center Warehouse, Etc.*, 193 F. 2d 156 (C. A. 9).

first day of his employment. At the outset, Plant Manager Skinner candidly warned Jordon that if he had anything at all to do with a union he would be "blackballed" from the Company. Skinner then gave Jordon explicit orders not to attend Union meetings. The subsequent events confirm that respondent implemented Skinner's "blackball" threat when it discharged Jordon.

Although Jordon had solicited for the Union at his prior job (R. 15; 57), Skinner's promise of a pay increase induced him to suspend his support of the Union during his first six weeks of employment. When Skinner denied his request for the raise, Jordon again resumed his union activities. He attended three successive Union meetings on March 17, 24, and 31, 1959, and respondent's retaliative action followed soon after. About March 1, 1959, even before Jordon had in fact attended any meetings, Plant Manager Skinner, apparently fearing that Jordon would renew his interest in the Union, falsely accused Jordon of going to its meetings (R. 30; 62).

The record shows, and respondent does not deny, that it was immediately apprised of Jordon's having reactivated his allegiance to the Union. Thus, after the meeting on the night of March 17, Jordon encountered and talked to Plant Manager Skinner in the Stringbusters Lounge. Similarly, following the March 31 meeting, Jordon saw Skinner at the cafe. Not only did Skinner concede at the hearing that on at least one occasion during the same period he was in the Stringbusters Lounge and was aware that a Union meeting was then in progress (R. 118-119),

but the record also shows that he habitually stationed himself in the public part of the cafe, confronted employees coming from the Union's meeting and attempted to influence them to reject the Union (see, *supra*, p. 4). One such episode occurred after the March 17 meeting when Skinner accosted employee Jessen departing from the identical Union meeting that Jordon had attended. On this occasion, Skinner tried to entice Jessen to forego his support of the Union with the lure of a pay increase as a reward.[8] In addition, Skinner first met Jordon and offered him a position immediately after Jordon's attendance at a Union meeting at the Stringbusters Lounge, and Skinner admitted that he "might have expressed [his] views and concern with the Union for management" in the ensuing exchange (R. 15; 98).

The foregoing incidents take on even more striking clarity when placed in their setting of respondent's opposition to the Union, for also during February and March, 1959, Skinner had been conducting meetings among the employees at the plant in which they were subjected to open threats of dismissal should they organize, *supra*, p. 3. See *N.L.R.B.* v. *Chicago Apparatus Company*, 116 F.2d 753, 759 (C.A. 7).

Significantly, respondent had never seen fit to warn Jordon about the possibility of his dismissal, except for Skinner's initial threat to take punitive action should he engage in union activities.[9] In fact, Jordon

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[8] As set forth above, pp. 4, 8, the Board found that this incident violated Section 8(a)(1) of the Act.

[9] At the hearing, Skinner admitted that the single official reprimand Jordan had received for smoking and loitering

had been commended for doing a satisfactory job, not only by his immediate supervisor but also by Skinner himself.

The above circumstances, we submit, amply support the Board's finding that Jordon's discharge was discriminatorily motivated.

Moreover, the Board's finding of discriminatory motivation here, is further buttressed by respondent's attempts to justify its action, for "the explanation of the discharge offered by respondent fails to stand under scrutiny." *N.L.R.B.* v. *Dant*, 207 F. 2d 165, 167 (C.A. 9).

Thus, respondent claimed before the Board that Jordon's attendance was irregular in that he frequently had unexcused half-day absences. But Jordon's credited testimony shows that he was absent just 2 half days in March, when the frequent absences were alleged to have occurred, once to borrow money to pay a bill, and once to take his child to a doctor, and both times his superiors knew of and had approved the absences (R. 33; 65-66). Jordon's "change of status" form, introduced into evidence by respondent, corroborates Jordon's testimony, for it shows that only twice during March did Jordon's weekly hours fall below the normal 40 hour work week (R. 33; 105, 110, 137). Nor had Jordan ever been criticized for poor attendance or unexcused absences. Similarly, Jordon complied with company instructions regarding the reporting of intended ab-

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played no part in the decision to discharge him (R. 33; 117, 74, 138).

sences on both April 1 and 2, when he was absent for reasons of health (R. 31, 37; 64, 66, 67, 73-74, 77, 115, 105).

Respondent also attempted to justify Jordon's discharge on the ground that he was insubordinate and uncooperative on one occasion in March, allegedly leaving the plant without permission although an urgent job assignment was not completed. However, the Trial Examiner, who had an opportunity to evaluate the "significance of the carriage, behavior, bearing, manner and appearances" of witnesses discredited Plant Manager's Skinner's and Foreman Brown's testimony relating to this incident. *N.L.R.B.* v. *Howell Chevrolet Co.*, 204 F. 2d 79, 86 (C.A. 9). The Examiner believed the testimony of Jordon and Taber, a fellow employee. They testified that Jordon had not only completed his phase of the assignment, but had also requested and obtained from Foreman Brown express permission to leave the plant for the day (R. 34-35; 126-128, 124-125). Other evidence in the record supports the reasonableness of the Trial Examiner's credibility resolution in this respect, which was adopted by the Board. Thus, respondent did not issue any written correction notice covering the matter, nor did it orally reprimand Jordon for this alleged major dereliction of duty, although Jordon remained in respondent's employ for another two weeks thereafter. And, although the "change of status" form purportedly sets forth the moving reasons for Jordon's dismissal, and is painstakingly precise with respect to his alleged bad attendance record, the document makes no reference at all to this incident (R.

137). Although respondent contended that the special job was urgent, there is no evidence that it attempted to reach Jordon who lived just 5 blocks from the plant after his asserted premature departure. Finally, respondent's contention that this March incident was one of the reasons for Jordon's discharge is in conflict with Skinner's testimony that he had made no decision to terminate Jordon as late as April 2.

Respondent's assertion before the Board that Jordon was not fired, but quit, is without record support. Jordon's credible account of the events after he arrived at the plant to question Skinner about the newspaper advertisement (*supra*, pp. 7-8) compels the conclusion that he did not quit, but was discharged. Cf. *N.L.R.B.* v. *Cement Masons Local 555*, 225 F. 2d 168, 172 (C.A. 9). Further demonstrating the correctness of the Board's finding in this respect are (1) Skinner's vacillating testimony in regard to the events; at one point he testified to the effect that Jordon quit, and at another that he was discharged (R. 104, 109, 111-112, 116-117, *infra*, pp. 20-21), (2) the fact that the "change of status" form states that Jordon was terminated, and sets forth the reasons, and (3) Skinner's specific admission that he decided to discharge Jordon "immediately after he was hired when [he] discovered that [Jordon] was not qualified as a maintenance man" (R. 37; 104, 109).

In the light of all these facts, we submit that the Board was fully justified in rejecting respondent's explanations for Jordon's discharge, and properly

concluded that Jordon was terminated when he "disobeyed Respondent's instructions at the time of his hiring to refrain from union activities . . . "and" proceeded to attend a union meeting, and was observed on the scene by Skinner" (R. 38).

CONCLUSION

For the reasons stated it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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January 1961

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8.(a) It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

APPENDIX B

Portions of Testimony of Employee Colle McKenzie and Plant Manager Ray Skinner Adduced at the Hearing

(McKenzie—Transcript, pp. 123-125)

Q. Now at the meetings around the time of the June 24th election, did you go to one of those?
A. Yes.
Q. What day was that?
A. June 24th
Q. I see. And before the election was held?
A. Yes.
Q. How many were at these meetings?
A. There was, at the meeting I was at, there was about 15.
Q. Was that held in Mr. Skinner's office too?
A. Yes.
Q. What did he say and do there?
A. It was about insurance that he managed to have passed out papers to us on election morning, and he brought us up to talk about the insurance mainly.
Q. What did he say about the insurance?
A. He was telling us the advantages of the insurance family group and what it covered and what it didn't cover.
Q. Was this something the company was making available?
A. Yes.
Q. Did he pass out any cards on that?
A. Yes, a card for us to fill out with a name and address and how many dependents.
Q. And in addition to insurance did he talk about anything else?
A. Yes.

Q. What?
A. A little on the Union.
Q. I see, what did he mention about the Union? Did he mention the election at all?
A. Yes.

* * * *

Q. What did he say about the Union and the election?
A. He said that he felt that the plant; that the guys would go far for the plant, you know, stay with the plant, and things would be all right.
Q. Did he suggest, in any way, how you should vote in the election?
A. He said that we should vote for the plant and not for the Unions.
Q. Between the talk about the insurance and the talk about the Unions and election, how was the time in that June 24th meeting divided up?
A. You mean what time?
Q. Well, I mean what portion time of the time was devoted to talk about insurance and what proportion was devoted to talking about other things?
A. We discussed the insurance policy there, the advantage of it, for about half of the first half, and then we talked about the Unions for about a quarter of it and then the last quarter quarter was on insurance again, the points brought up on the policy and the questions brought up about it.
Q. I have no further questions.

SKINNER—Transcript, pp. 210-211)

Q. Is it your testimony that the reason he was terminated was because he came in with newspaper clipping in his hand?
A. Yes.

Q. And when he asked for an explanation of the newspaper clipping, what did you reply?
A. I told him, I believe I told him, that I was looking for another maintenance man.
Q. I see, and was there room for two maintenance men in the plant?
A. I don't know at the time whether there would have been or not.
Q. TRIAL EXAMINER BENNETT: Were you looking for a maintenance man for that job.
A. Yes, I was.
Q. (By Mr. Henderson) You were looking for a maintenance man for Jordon's job, is that right?
A. That's true.
Q. And you didn't mention to him any other job in the plant that he might have, is that correct?
A. No, I did not.

* * * *

(SKINNER—Transcript, p. 222)

Q. (by Mr. Weston) Now what was your position as of the date he brought the notice in as to whether or not he was or was not discharged?
A. I was undecided at the time when he brought the newspaper clipping in, if that's what you're referring to. However, it was practically impossible for us to continue operation in a plant of our size with the equipment we have without a maintenance man, and comeone certainly has to be on that job at all times as it cannot go unattended

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IN THE

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Court of Appeals

For the Ninth Circuit

No. 17,057

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

KIT MANUFACTURING COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF RESPONDENT

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IN THE

United States

Court of Appeals

For the Ninth Circuit

No. 17,057

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

KIT MANUFACTURING COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This proceeding is before the court on the petition of the National Labor Relations Board, hereinafter called the Board, for enforcement of its order against Kit Manufacturing Company, hereinafter called the Respondent.

The complaint giving rise to this proceeding was filed by the Board through the Regional Director for the Nineteenth Region on August 24, 1959. (R. 3 G. C.'s Ex. 1-V) Said complaint alleges that Respondent had engaged, and was engaging, in certain unfair labor practices affecting commerce as set forth and defined in the Labor Management Relations Act, 1947, as amended (61 Stat. 136, 29 U. S. C. A. Sec. 141 et seq.), hereinafter called the Act. Following the issuance of the complaint, a hearing was held before a Trial Examiner whose Intermediate Report and Recommended Order was issued on the 6th day of January, 1960. (R. 11) Timely exceptions to said Intermediate Report were filed with the Board by Respondent. The Board thereafter adopted the findings, conclusions and recommendations of the Trial Examiner. (R. 45)

It was found by the Trial Examiner and the Board that the Respondent had violated Section 8(a) (3) and (1) of the Act by discharging the employee Elsworth Jordon because of his union membership and activities. The Trial Examiner and the Board also rejected Respondent's contention that Elsworth Jordon was discharged for insubordination and leaving a job unfinished without permission on the day the discharge took place.

SUMMARY OF ARGUMENT

The Trial Examiner's Intermediate Report is filled with many findings of fact wholly unsupported by evidence rendering any legal conclusions drawn

therefrom completely improper and incorrect.

Jordan was hired as a maintenance man under rather unusual circumstances. He agreed with the company to refrain from union activities inasmuch as they would interfere with the proper performance of his duties. This arrangement was of his own choice and it appears to have been entered into voluntarily. (R 61)

The record shows that Jordan was inefficient and unable to perform the skilled duties usually imposed upon a maintenance man. It is generally accepted that a maintenance man must be qualified to do a number of different jobs in the plant involving electricity, plumbing, carpentry, etc. (R 104 to 109 Inc.)

The testimony of the plant superintendent Skinner shows that Jordan was given a long trial period and many opportunities to qualify as a maintenance man as appears from the testimony of Skinner on page 104 of the printed record:

> "A. * * * we like to give an employee ample opportunity to prove his ability to do the work that he's supposed to do and we don't take action; don't have action too hastily because there's operations there in the plant that need to be done and it takes some time for an employee to work through the various stages of the job, and I, for one, certainly like to give the employee the benefit of the doubt and not make decisions too hastily as to his ability to do the job.

Q. Did you give him an opportunity to work?

A. I feel we gave him ample opportunity, yes."

It should be born in mind that the training of a maintenance man takes considerable time as this employee's work requires an accurate knowledge of many job classifications, including plumbing, electricity, machine work, etc. We believe it would be helpful to point out to the court the different rules violated by Jordon to give an idea of his inefficiency, his mental attitude and his inability to qualify as a maintenance man. We also call attention to the fact that when he finally severed his connection with the company, it was more or less at his own insistance and according to the undisputed testimony, had he shown the proper attitude, he would have been offered a different job. (R 107, 121, 122, 123, 131) Insubordination shown when he refused to sign correction notice card (R 109)

The record shows that Jordan was guilty of the following infractions of the rules:

1. He was continually late for work and took many half days off. (R. 105)

2. Violation of company rules such as lack of interest in the work, unqualified to perform the duties, being absent and late, etc. (R. 107)

3. Insubordination, refusal to sign a report upon request. (R. 108)

4. Loitering and smoking in the rest room which was near the timeclock, making it possible for the employee to check out first or ahead of time,

refusing to follow and heed warnings on this violation. (R. 108). The superintendent testified that the warning notice is not prepared unless it is a second or third violation. (R. 108, 109)

5. Complete lack of knowledge of electricity, claiming that he couldn't work on electric wires for some time after the switch was broken because the electricity hadn't drained out of the line. (R. 103)

6. Numerous complaints from other foremen. (R. 103)

7. Deliberately leaving his job on a Saturday afternoon when he was specifically instructed to complete certain work necessary to Monday's operation. (R 117)

The Trial Examiner seems to be confused on the evidence as to the final act of insubordination on the part of Jordon. The record shows that Jordon was accountable to the superintendent, Skinner, which is the normal relationship in the case of maintenance men. The record shows further that on the date in question, Jordon had no permission from Skinner to leave the premises although there is some vague reference in the record to the fact that he had permission from some subordinate individual working on the same shift.

There is also some confusion as to what transpired on the day Mr. Jordon's services were terminated. According to Skinner, Jordon came to the plant with a newspaper clipping and asked, "Does this mean I'm terminated?" and Skinner replied that he had not written any termination

notice on him but was looking for another maintenance man and Jordon replied, "Well, that means I'm fired." and Skinner replied, "Well, if that's the way you want to put it, that's the way it is." Skinner further testified that he hadn't intended to discharge Jordon but was going to transfer him to another job, but because of Jordon's belligerent attitude and conclusion that he was terminated, Skinner changed his mind and let Jordon quit. (R.111)

The testimony of Skinner as to Jordon's refusal to work and his insubordination is corroborated by Foreman Brown who testified that Jordon refused to complete the job assigned to him on the Saturday before his discharge. (R 123) Brown testified that he was in charge on that particular morning and that when he came back Jordon was gone. Since Jordon was required to report either to Skinner or Brown and reported to neither one, it is quite clear that he left without proper authority and refused to complete his work. This is also supported by the statement by Jordon, himself, that he was not feeling well on the morning in question as he had been out to a party the night before. Jordon testified that he explained his difficulties to someone at the plant but not Brown or Skinner and that he took off before the work was finished. On page 127 of the printed record, Jordon seems to be confused as to why he left early. In one answer he states that he told Brown that he was not feeling well and that he asked if he could go home and Brown was

purported to have said O.K., but in another place he claims the work was finished. However, both Brown and Skinner testify that they had to stay and finish the job themselves.

We find the Trial Examiner in error in his conclusion in the paragraph between lines 30 and 45 on page 11 of his Intermediate Report (R. 31) wherein he claims that Skinner admitted that Jordon's superior had notified him, Skinner, that Jordon would be absent. We further object to the Trial Examiner's supporting his findings from evidence not in the record such as the affidavit of Skinner submitted to the Board. We do not believe any such affidavit was ever received.

This is the usual case of where the Trial Examiner automatically and systematically rules out the evidence from the Respondent's witnesses while accepting the evidence of appellants. However, we fail to see how, in the face of the record of this man's numerous violations, his inability to perform his duties and his deliberate insubordination, anyone can justify the conclusions arrived at by the Trial Examiner.

ARGUMENT

The resoning in the recent Birmingham Publishing Co. case, 262 F.2d 2, should point to the solution for the Board. The statement by the Court in that case is truly significant and we quote:

"III. This court has held that 'the burden is on the Board to prove and not on the employer to

disprove the presence of anti-Union animus or other prohibited discriminatory motivations in hiring and firing'. We cannot say that the Board has met the burden of proof that Edwards' discharge was 'discriminatorily motivated' or that the Board's finding of unlawful motivation is supported by substantial evidence. On this phase of the case we are in agreement with Member Jenkins, dissenting member of the Board.

"If a man has given his employer just cause for his discharge, the Board cannot save him from the consequences by showing that he was pro-union and his employer anti-union. We have no doubt that the Birmingham Publishing Company was glad to get rid of Edwards. But the Company has a right to operate its plant efficiently. If an employee is both inefficient and engaged in union activities, that is a coincidence that does not destroy the just cause for his discharge. We cannot say, and the evidence does not support the conclusion that the Board can say: Edwards was fired because the Company's officials had an anti-Union animus against Edwards."

The Decision in the above case is the culmination of a number of previous cases beginning with NLRB vs. Tex-O-Kan Flour Mills Co., 122 F.2d 433, down through NLRB vs. Fulton Bag & Cotton Mills, 175 F.2d 675, NLRB vs. Ray Smih Transport Co., 193 F.2d 142, and NLRB vs. Denton, 217 F.2d 567.

The question of whether or not the employer was guilty of a violation of 8(a)(3) and (1) of the Act

by interfering with or coercing employees in the exercise of their right to organize or to form, join or assist any labor organization, can be answered briefly in this way. The employer, as represented by Skinner, was very frank, candid and honest. He in all instances stated his own personal opinion of the company to pay additional wages or operate under more expensive conditions. On this point we refer to the printed record starting on page 99 wherein we find Skinner frankly and honestly stating his difficulties in operating the plant and we quote:

> "A. I was referring that a plant such as this . . . I had certain amount of dollars and cents to put in this plant to get it into production and that's all that I had to make this plant a paying proposition in order to keep the employees employed at the rate of pay they're making, and it was at the extreme end that I could afford to pay at that time and I might have mentioned that under no Union organization could I afford to pay any more money and couldn't until the plant had a better foundation to stand on, and I asked the employees that I had to give management a chance and give us a little more time before they got into something that might be of serious consequences."

Skinner was not opposed to unions but felt that under the present operating budget he could not afford any increases. Skinner's attitude is also shown on page 99 of the printed record wherein he told the employees to all vote and to vote for their

choice of either management or union to represent them, but he did frankly state he felt that *at this time* management could do more for them than the union. In explaining this, he went on to say that he had a certain amount of dollars to put into the plant and that was all.

With reference to the insurance, Skinner testified, and it is not disputed, that it was absolutely necessary to get the insurance into effect immediately and that he had specific instructions by teletype from California to have the cards returned by the following Monday. (R. 100)

The Respondent has consistently asserted the position throughout these proceedings that Jordon was discharged because of his leaving work without the permission of the production manager. It is uniformly recognized that the discharge of an employee for such an offense is not violative of of the Section 8(a)(3) and (1) of the Act. While the Act does protect employees from discrimination because of Union activity, a discharge for a legitimate reason does not fall within the statutory prohibitions.

NLRB vs. Blue Bell (5th Cir., 1955), 219 F.2d 796;

NLRB vs. Hibriten Chair Co., Inc. (4th Cir., 1952) 197 F.2d 1021;

NLRB vs. Superior Co. (6th Cir., 1952), 199 F.2d 39.

In proceedings under Section 8(a)(3) and (1) of the Act involving alleged descriminatory conduct

on the part of an employer, the employer's motivation in taking the action complained of is a most significant factor. This principle has been recognized by this Court in NLRB vs. Kaiser Aluminum & Chem. Corp. (9th Cir., 1954), 217 F.2d 366, where it was said:

> "The charge of the complaint is that these three particular discharges were discriminatory. Discrimination relates to the state of mind of the employer. 'The relevance of the motivation of the employer in such discrimination has been consistently recognized * * *.' The General Counsel had the burden of the issue."
>
> NLRB vs. Kaiser Aluminum & Chem. Corp., 217 F.2d 366, 368.

See also:

> NLRB vs. Adkins Transfer Co., (6th Cir., 1955), 266 F.2d 324;
>
> NLRB vs. McGahey (5th Cir., 1956), 233 F.2d 406.

The Courts unanimously hold that where the discharge was pursuant to the good faith belief on the part of the employer that the activities engaged in were not protected by the Act. In this case, it appears that several other employees were discharged during the same period and under similar circumstances, and the Trial Examiner did not find such other charges to be contrary to the Act. The discharge of an employee under such circumstances has been held to lack the necessary unlawful motivation and would therefore not be in

violation of the Act. In other words, the company had a number of inefficient employees, and it was necessary to discharge these employees from time to time to build up a proper crew in a new industry. The timing of the discharges over a period of 30 to 40 days was such as to show that it was simply a weeding out of inefficient employees. One discharge was in no different circumstances than another. The motivation of the employer is the crucial element in determining a violation. The record shows no different motivation towards Jordon than the others. It was simply a case of giving an employee all of the chances possible for him to succeed and the employee failing to take advantage of his opportunities by, among other infractions, deliberately walking off the job leaving the work to be performed by the plant superintendent and the foreman.

It would seem, therefore, that Skinner in all instances was merely giving his opinion; he was making no threats or promises and he sincerely felt that the company could do more for the employees than the union and he expressed this opinon along with the suggestion that they all vote and that they vote for either the union or management, whichever way they felt was best.

CONCLUSION

Under these circumstances, we fail to find any evidence of an interference with the union's activities. We feel that the General Counsel has failed to

carry the burden or to prove by substantial evidence that the dischage was not for cause.

DATED: February 3, 1961.

Respectfully submitted,

ELI A. WESTON,

Attorney for Respondent.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C., Secs. 151, et seq.), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

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Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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Boise, Idaho.

GENERAL COUNSEL'S EXHIBIT 1-V

United States of America
Before the National Labor Relations Board
Nineteenth Region

Cases Nos. 19-CA-1742, 1766

KIT MANUFACTURING COMPANY

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO

and

Case No. 19-CA-1815

BLUE MOUNTAIN DISTRICT COUNCIL, LUMBER & SAWMILL WORKERS, AFL-CIO

SECOND AMENDED CONSOLIDATED COMPLAINT WITH ORDER CONSOLIDATING CASES AND NOTICE OF HEARING

It having been charged in Cases Nos. 19-CA-1742 and 19-CA-1766 by United Steelworkers of America, AFL-CIO, herein called Steelworkers, and in Case No. 19-CA-1815 by Blue Mountain District Council, Lumber & Sawmill Workers, AFL-CIO, herein called Millworkers, that Kit Manufacturing Company, herein called Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the Labor Management Relations Act, 1947, as amended (61 Stat. 136, 29 U. S. C. A. Sec. 141 et seq.), herein called the Act, the General Counsel of the National Relations Board, on behalf of the Board, by the undersigned Regional Director, acting pursuant to Section 10 (b) of the Act and Sections 102.15 and 102.33 of the Board's Rules and Regulations, Series 7, as amended, hereby orders that these cases be and they here-

by are consolidated, and hereby issues this Consolidated Complaint with Order Consolidating Cases and Notice of Hearing:

I.

The charge in Case No. 19-CA-1742 was filed on March 9, 1959, and a copy thereof was served on Respondent by registered mail on or about March 9, 1959. An amended charge in the same case was filed June 1, 1959, and a copy thereof was served on Respondent by registered mail on or about June 1, 1959. The charge in Case No. 19-CA-1766 was filed on April 14, 1959, and a copy thereof was served on Respondent by registered mail on or about April 14, 1959. The charge in Case No. 19-CA-1815 was filed on July 6, 1959, and a copy thereof was served on Respondent by registered mail on or about July 6, 1959.

II.

Respondent, a California corporation, is engaged in the manufacture and sale of trailers and mobile homes with plants at Long Beach, California and Caldwell, Idaho. Since December 1, 1958, when the Caldwell plant went into production, Respondent has produced at the Caldwell plant over $100,000.00 worth of trailers and mobile homes, of which over $65,000.00 worth were sold and delivered to purchasers located outside the State of Idaho.

III.

Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

IV.

Steelworkers and Millworkers are labor organizations within the meaning of Section 2(5) of the Act.

V.

Commencing on or about January 1, 1959, Respondent, by its officers, agents and representatives, restrained, interfered with and coerced its employees at the plant at Caldwell, Idaho, in the exercise of their rights guaranteed under Section 7 of the Act, and is now so restraining, interfering with and coercing its employees. More particularly, Respondent, among other things, has engaged in the following acts and conduct:

(a) On or about January 22, 1959, warned two former employees that it would rehire them only on condition that they would not engage in any union activities in or near the plant at Caldwell.

(b) During January and February, 1959, conducted meetings of employees in which it told employees that if a union were voted in at the Caldwell plant, no one who signed a union authorization card would be promoted to a supervisory position.

(c) On or about March 17, 1959, told an employee that if he would keep out of union activities it would be to his benefit and that after Steelworkers lost a forthcoming Board election, he would receive higher wages.

(d) During February 1959, told another employee that he was not to have anything to do with unions and that he would be blackballed from Kit if he had anything to do with unions, and also requested this employee to talk against unions.

(e) Shortly before a Board election conducted on June 4, 1959, and on June 24, 1959, immediately preceding a run-off Board election on that day, held meetings of employees on company time and premises in which it told the employees, among other things, that if the plant went union all the employees would lose their jobs and Re-

spondent would start again with a new crew and that if they did not vote for the union the employees would receive paid holidays and paid vacations and insurance benefits.

VI.

Because of their membership in and activities on behalf of Steelworkers, Respondent on or about January 21, 1959, discharged Larry O'Brien, Jr., and George T. Norris, and, after a purported reinstatement, again discharged O'Brien and Norris on or about January 29 and February 25, 1959, respectively, and since that time has refused to reemploy O'Brien or Norris.

VII.

On or about February 25, 1959, Respondent discharged Archie Murray and since that time has refused to reemploy Murray because of his membership in and activities on behalf of Steelworkers.

VIII.

On or about February 27, 1959, Respondent discharged Lyall Howard and since that time has refused to reemploy Howard because of his membership in and activities on behalf of Steelworkers.

IX.

On or about April 3, 1959, Respondent discharged Ellsworth Jordan and since that time has refused to reemploy Jordan because of his membership in and activities on behalf of Steelworkers, and also because Respondent learned that Jordan had given statements to a Board agent in connection with this and another Board case.

X.

By its acts and conduct described above in paragraphs V through IX, inclusive, Respondent has interfered with, restrained and coerced its employees, and is interfering with, restraining and coercing them in the exercise of their rights guaranteed under Section 7 of the Act, in violation of Section 8 (a) (1) of the Act.

XI.

By its discharge of O'Brien, Norris, Murray, Howard and Jordan, as described above in Paragraphs VI through IX, inclusive, Respondent has discriminated and is now discriminating against its employees, and in particular against the said O'Brien, Norris, Murray, Howard and Jordan, in such a manner as to discourage membership in Steelworkers and other labor organizations, in violation of Section 8 (a) (3) of the Act.

XII.

By its discharge of Jordan because of giving statements to a Board Agent as described above in paragraph IX, Respondent discharged and discriminated against Jordan for giving testimony under the Act, in violation of Section 8 (a) (4) of the Act.

XIII.

The activities of Respondent described above in paragraphs V through IX, inclusive, occurring in connection with the operations of Respondent as described above in paragraphs II and III, have a close, intimate and substantial relation to trade, traffic and commerce among the several states of the United States, and have led to and tend to lead to labor disputes burdening and obstructing commerce, and the free flow of commerce, within the meaning of Section 2(6) and (7) of the Act.

XIV.

The aforesaid acts of Respondent as set forth and described above in paragraphs V through IX, inclusive, constitute unfair labor practices affecting commerce within the meaning of Section 8 (a) (1), (3) and (4), and Section 2(6) and (7) of the Act.

Please Take Notice that on the 15th day of September, 1959, at 10:00 a.m., MST, in the Probate Court Room in the Court House Annex, Caldwell, Idaho, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You Are Further Notified that, pursuant to Section 102.20 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four copies of a verified answer to said complaint within ten (10) days from the service thereof, and that unless it does so all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated at Seattle, Washington, this 24th day of August, 1959.

[Seal]

/s/ THOMAS P. GRAHAM, JR.,
Regional Director.

National Labor Relations Board,
19th Region
407 U. S. Court House,
Seattle 4, Washington

GENERAL COUNSEL'S EXHIBIT 1-Z

[Title of Board and Cause.]

ANSWER

Comes Now the Respondent and for its Answer to the Second Amended Consolidated Complaint in the above cases denies each and every allegation contained therein not hereinafter admitted, qualified or explained. Respondent re-affirms its Answer filed in the Consolidated Complaint and in the Amended Consolidated Complaint in Cases No. 19-CA-1742 and 19-CA-1766 and asks that said Answers constitute an answer to the Second Amended Consolidated Complaint.

I.

Respondent admits Paragraphs I, II, III and IV, but denies Paragraphs V, VI, VII, VIII, IX, X, XI, XII, XIII, and XIV, and in connection therewith alleges that Respondent is unable, because of insufficiency, ambiguity and indefiniteness of the allegations contained therein to answer Sub-paragraphs (a), (b), (c) and (d) of Paragraph V as no time or place or names of employees are mentioned and therefore denies all of said allegations and asks that said paragraphs be stricken from the Complaint as indefinite and improper. Respondent specifically denies Sub-paragraph (e) of Paragraph V.

II.

Respondent denies Paragraphs VI, VII, VIII and IX upon the grounds and for the reasons that said employees were either laid off for cause or quit of their own free will and accord or were unable to perform the services assigned to them, and denies that any of the

severances were discriminatory or in violation of Section 8 or any other section of the Act.

III.

Respondent specifically denies Paragraphs X, XI, XII, XIII and XIV and in connection therewith re-affirms that said layoffs or severances of employment were for reasons other than interferences with the employees' protected activities and were not violations of Section 7 or 8 or any other sections of the law.

Wherefore Respondent asks that the Second Amended Consolidated Complaint in the above entitled case be dismissed on the grounds that the allegations contained therein are not true and on the further grounds that the allegations are vague, indefinite, uncertain, ambiguous and allege incidents too remote, too indefinite and too uncertain for the Respondent to answer or prepare a defense for the same.

KIT MANUFACTURING COMPANY,

/s/ By ELI A. WESTON,
Attorney,
711½ Bannock St.,
Boise, Idaho.

Duty Verified.

Affidavit of Service By Mail Attached.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

This proceeding against Respondent, Kit Manufacturing Company, was heard at Caldwell, Idaho, on September 15 and 16, 1959. The issues litigated were whether commencing January 1, 1959, Respondent engaged in various acts of interference, restraint, and coercion, and discharged two employees on or about January 29 and April 2, 1959, respectively, thereby engaging in unfair labor practices within the meaning of Section 8(a)(1)(3) and (4) of the Act.[1] Oral argument was waived at the close of the hearing and briefs have been sūbmitted by the General Counsel and Respondent.

On the entire record in the case, and from my observation of the witnesses, I make the following:

Findings of fact

I. The business of Respondent

Kit Manufacturing Company is a California corporation engaged in the manufacture and sale of trailers and mobile homes at plants in Long Beach, California, and Caldwell, Idaho. The Caldwell, Idaho, plant with which this proceeding is concerned entered into production on or about December 1, 1958. From that date to the date of the amended complaint, August 24, 1959, it has produced trailers and mobile homes valued in

[1]A motion by the General Counsel to dismiss non-litigated allegations of discrimination as to three other employees was granted during the hearing.

excess of $100,000. Of these, sales and shipments valued in excess of $65,000 have been made to points outside the State of Idaho. I find that the operations of Respondent affect commerce.

II. The labor organizations involved

United Steelworkers of America, AFL-CIO, and Blue Mountain District Council, Lumber & Sawmill Workers, AFL-CIO, are labor organizations admitting to membership the employees of Respondent.

III. The unfair labor practices

A. Introduction; the issues

Respondent's Caldwell plant was established in November 1958 and shipments of products commenced in December. This enterprise quickly drew the attention of various labor organizations and, on January 19, 1959, United Steelworkers of America, AFL-CIO, herein called the Union, filed a representation petition in Case 19-RC-2290 covering the approximately 104 employees. Two other labor organizations, including Blue Mountain District Council, Lumber & Sawmill Workers, AFL-CIO, herein called Lumber and Sawmill Workers, intervened and a hearing was held on February 17, 1959.

The election was held up because of the charges in the instant proceeding,[2] but it was ultimately held on June 4, 1959, with three labor organizations participating. The two highest votes were for nonunion and for Lumber and Sawmill Workers. A run-off election was conducted on June 24, and a majority of the votes were cast in favor of no-union. Objections to the

[2]The original charge in Case 19-CA-1742 was filed by the Union on March 9, 1959.

election were thereafter filed, and it appears that, subsequent to the close of the instant hearing, the Board has, on October 13, 1959, set aside the run-off election and directed that another election be held.

The alleged acts of interference, restraint, and coercion consist of statements that employees would be hired only on condition that they refrain from union activities, statements that employees who signed union authorization cards would not be promoted to supervisory positions if a union were voted in, promises of benefits if the Union lost a representation election, threats of reprisals for engaging in union activities and voting in a union, a request that an employee talk against unions, and promises of benefits in return for a no-union vote, all between January and June of 1959.

It is further alleged that Larry O'Brien, Jr., was discharged on or about January 21, 1959 and again discharged on or about January 29, after a purported reinstatement, because of his membership and activity in behalf of the Union and that Elsworth Jordon was discharged on or about April 3, 1959, for the same reason and further because he had given statements to a Board agent in connection with this and another case. The case is marked by a number of conflicts in testimony.

B. Interference, restraint and coercion

The alleged discriminatory discharge of Larry O'Brien, Jr., is discussed hereinafter. The General Counsel contends at this point that O'Brien, at the time of his rehiring on January 22, 1959, was unlawfully warned that he was being rehired only on condition that he refrain from engaging in any union activities in or near the plant. According to O'Brien, he encountered Gen-

eral Manager Ray Skinner that evening in a bar and Skinner offered him and another ex-employee jobs "if he would not engage in union activities in or around the plant," pointing out that O'Brien and another employee had previously violated Company Rule 20. This rule forbids "Distributing written or printed matter of any description on Company premises unless approved by Management."

The testimony of O'Brien discloses, however, that O'Brien and his colleague viewed this statement by Skinner as being directed to activities during working time. O'Brien, who admittedly had considered it permissible to distribute union literature during working time, testified that "We said that we wouldn't do that around the plant or on Company time." He further testified that Skinner conditioned reinstatement on their not engaging in union activities "in or around the plant"; the men promptly responded that there was no restriction upon engaging in union activities "on their own time" and Skinner did not dispute this.

The testimony of Skinner is that reports had come to him from foremen that O'Brien had distributed "material in the plant when he should have been working" and that "he was passing out union cards, I believe, to put it exact in the plant and on Company time." Skinner elsewhere testified that, according to the reports, the employees would read the cards and that this was a time-consuming matter.

The General Counsel makes no attack upon Rule 20 as such and I am convinced, from the foregoing testimony, that the thrust of Skinner's statements was directed to O'Brien carrying on union activities during working time only. O'Brien's testimony reveals that

his union activities, primarily card distribution, were slight and that he did this chiefly during nonworking time. Accordingly, I find that Respondent in this respect did not engage in conduct violative of the Act. N. L. R. B. v. Peyton Packing Co., 142 F 2d 1009 (C. A. 5) cert. denied 323 U. S. 730, F. C. Huyck & Sons, 125 NLRB No. 34, and Walton Manufacturing Co., 124 NLRB No. 181.

The next incident involved employee Elsworth Jordon whose discharge is discussed hereinafter. On or about February 1, 1959, Jordon, who had just resigned his position with another employer, attended a meeting of the Union held in a private room attached to a local bar known as the Stringbusters Lounge. As he left the room and entered the public portion of the premises, he encountered Skinner at a table and joined the group. According to Jordon, Skinner discussed the possibility of employing him, said that he could do things for employees that a union could not do, and stated that if he hired Jordon he did not want him to have anything to do with unions. Jordon replied that this restriction was agreeable with him, but disclosed that he had "signed a deal," presumably a union card, at his previous employer's premises.

Skinner testified that he recalled no discussion of unions on this occasion, but admitted that he might have said he could not afford to pay a union scale. Employee Billy Williams, a union member, who was placed in the group by Jordon, supported Skinner's version of the incident. He testified that Skinner said he could top any offer from Jordon's prior employer, that he could do more for Jordon than a union could do, and that he, Williams, recalled no discussion of Jordon's union activities. I credit Skinner's version of this incident, as

supported by that of Williams, a witness for the General Counsel, and it appears that Jordon may have had in mind a conversation the next morning as set forth below.

The following morning Jordon reported to work and I find, as he uncontrovertedly testified, that he was informed by Skinner that he would be "blackballed" if he had anything to do with the Union, that he, Skinner, did not want him to attend any union meetings, and that although he was not so ordering Jordon, he did not wish him to attend any union meetings; Skinner did not recall any conversation on this occasion.

Sometime in March of 1959, according to the credited testimony of employees Billy Williams and Donald Jessen, Skinner summoned the entire finishing crew to his office. He stated that he could do more for the employees than any union, but if the Union came in, as Williams testified, he could not afford to pay women the union scale to perform men's work. He stated that if the Union came in, the plant would be closed and "nobody would have a job." Jessen attributed similar statements to Skinner to the effect that if the Union came in Respondent would be unable to keep the plant open "and he would have to close it down and everyone would lose their jobs."

A number of women on the finishing crew were present on this occasion and Skinner pointed out that in the advent of union organization with attendant union wage scales he would be compeled to replace the women with male employees who could undertake heavier duties. Skinner also pegged this discussion on a broader basis, stating that he could not pay union wages and that the plant would have to be shut down.

Skinner admitted holding meetings of employees in February and March during which he expressed his views on union organization. He did not deny the foregoing statements attributed to him by Williams and Jessen, although he admittedly stated in meetings held during June, discussed below, that in the advent of a union contract with higher wage scales for women, the latter might be replaced by men who could perform heavier tasks.

On the night of March 17, 1959, Jessen attended a union meeting at the Stringbusters Lounge. On leaving the meeting, he passed through the bar and encountered Skinner. The latter asked him why he wanted a Union, and, after Jessen replied that unionzation would result in better working conditions, Skinner stated, as Jessen testified and I so find, "If you'll string along with me, I can do more for you than any union. I know you're happy making a $1.45 an hour [apparently Jessen's rate of pay] . . . but if you string along out here with me and help us, we'll help you . . . You won't be making that $1.45, you'll be beating that."[3]

As set forth, an election in the representation proceeding was scheduled for June 4, and the General Counsel relies herein on several talks to employees by Skinner at this time. Colle McKenzie, still in the employ of Respondent, testified and I find, that approximately one week before the June 4 election, he was one of a group of approximately 12 employees summoned to Skinner's office. Skinner stated that the newly formed plant did not need a union as it was premature; that Respond-

[3]Skinner did not recall the occasion but did not deny that such a conversation took place. Jessen further testified that Skinner made a reference to having a list of names of those employees who had signed cards. However, the complaint does not advert to the latter statement, and no finding is made thereon.

ent would rather wait before union activities commenced; that the employees should not attend union meetings; and that it would be desirable to wait for one year to ascertain how the plant progressed.

Skinner again raised the subject of female employees. He stated to his all male audience that rather than pay male wages to women he would discharge the female employees and replace them with men.[4] Skinner stated that "before he would pay Union wages, what the Kit plant has on the coast . . . that he would know who voted and he would let us go."

Finally, Skinner for the first time raised the topic of a group insurance plan for employees, stating that Respondent had been trying to install one at the plant, but "that it would probably be a year but he would work on it and see if he couldn't get it sooner." This was the first reference to the insurance plan, according to McKenzie, who had entered the employ of Respondent in February, and there is no evidence to the contrary.[5]

A second meeting was held on June 3, under similar circumstances, and was attended by nine or ten employees including Donald McKinney. While McKenzie testified that he attended a second meeting on or about this date which followed the pattern of the previous one,

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[4]The record does not disclose which positions in the plant were filled by women.

[5]Skinner admitted that he explained his views on unions at this and other meetings discussed below during this period and that he mentioned the possibility of the plant closing down if the Union came in, as well as the replacement of women by men. He denied stating that an insurance plan could not be installed for about a year, but did admit saying, "it could be possible that this plant would have to operate for one year before we could get an underwriting company to take insurance on it." As appears below, there was a dramatic change of circumstances on June 24, the day of the run-off election.

it is not clear whether he was referring to the same meeting described by McKinney, as set forth below.

According to McKinney, and I so find, after discussing union promises of improved working conditions and stating that Respondent would not be dictated to, Skinner announced that the plant was at the break-even point. Although praising his crew, he stated that Respondent "would not tolerate a Union, would dismiss the entire crew if they went Union and start with a new crew." He also stated that, "If you vote Union, you can be dismissed from the company for voting Union." He brought up the insurance plan again, acknowledging that there had been discussion on the topic, but stated that Respondent "couldn't afford to pay for the plan in less than a year."

On the morning of the run-off election, June 24, as McKenzie testified, and I so find, approximately 15 employees were summoned to a meeting in Skinner's office. Skinner immediately brought up the insurance plan, explaining that Respondent was now in a position to install a group insurance plan. He extolled the advantages of such a plan and distributed cards on which the men were directed to list their names, address and dependents. He turned the subject to the election and stated that they "should vote for the plant and not for the Unions."

Skinner stated that it was urgent to have the cards signed and returned to the West Coast within a day or two in order to meet a deadline for putting the plan into effect. In his testimony, Skinner admitted that the insurance plan was announced on this occasion immediately prior to the election. He claimed that Respondent had been working on the plan since the start of the plant at Caldwell the previous November; that he had been ad-

vised on June 23 by the company secretary at the California plant that it was necessary to have the cards returned to California by the following Monday, presumably June 29; and that this was the reason for his haste. I find, however, that as recently as June 3, three weeks earlier, Respondent had put its employees on notice that the insurance plan would not be installed for approximately one year.

Conclusions

I find that Respondent has unlawfully interferred with, restrained and coerced its employees in the exercise of the rights guaranteed by Section 7 within the meaning of Section 8(a)(1) of the Act by the following conduct:

(1) The statement by Skinner to Employee Jordon, on reporting for work on or about February 2, that he would be "blackballed" if he had anything to do with the Union and that he did not want him to attend union meetings, clearly a threat of economic reprisal for so doing.

(2) The statement by Skinner to the finishing crew in March that he could not afford to pay women the union scale and that if the Union came into the plant, the plant would be closed and everyone would be out of a job. He also stated that he could not pay union wages and that unionization would result in a plant shutdown. These statements were open threats of reprisals to female employees as well as the entire complement for engaging in union activities.

(3) On March 17, Skinner told employee Jessen that he could do more for him than any union and that if he strung along with him, Jessen would be receiving more than his existing rate of pay. This was manifestly a

promise of a benefit for rejecting the Union or for not supporting it.

(4) At a meeting approximately 1 week prior to June 4, 1959, Skinner announced that female employees could be discharged and replaced by men if all wages were raised to the scale for men; the context was one wherein the employees were being urged to reject unionization. As such therefore, it was a threat of reprisal for engaging in union activities.

(5) In the same talk, Skinner stated that he would ascertain who had voted for the Union and would discharge them before he paid union wages, clearly a threat of economic reprisal.

(6) At the June 3, 1959 meeting, Skinner announced that he would not tolerate a union and that he would discharge the crew and replace them with new employees if they voted in favor of a union; the threat of economic reprisal is manifest.

(7) On June 24, immediately prior to the run-off election, Skinner urged the employees to vote against unionization in the election and at the same time announced that a group insurance plan was being installed. While Respondent may have been working on an insurance plan since November 1958, as Skinner claimed, by contrast, only several weeks before, Skinner had more than once pointed out to employees that the introduction of such a plan was at least 1 year distant. It is clear that the plan was pushed through rapidly and the only evidence by Respondent of its introduction is the testimony of Skinner who allegedly knew only what he had been told by the management of the California plant.

A preponderance of the evidence warrants the con-

clusion that Respondent precipitately announced the introduction of the insurance plan on the day of and preceding the June 24, election for the purpose of influencing the votes of employees in the election; indeed, as noted, part of his talk was devoted to precisely that point, viz., a plea for a no-union vote. While time may conceivably have been of the essence, assuming Respondent's bona fides in installing the plan, at the very least it would seem and I believe that announcement of the plan could have been delayed until the close of the polls on election day with no resultant hampering of Respondent's timetable of operations. I am convinced and find that announcement of the plan was timed so as to offer employees an economic benefit in return for rejecting a labor organization in the election later that day.

C. The discharge of Larry O'Brien, Jr.

O'Brien entered the employ of Respondent in November 1958 and was assigned to the tool room. He testified that soon thereafter he became active in the Union and distributed union cards in the plant, primarily on his own time. Plant Manager Skinner admittedly knew that O'Brien and another employee were distributing cards for the Union in the plant. There is no evidence of any other union activities on his part prior to his discharge.

On January 14, 1959, O'Brien was assigned to the operation of a fork lift truck. Skinner uncontrovertedly testified that he contacted O'Brien during the day and cautioned him against operating the vehicle like a "hot-rod." Within five minutes, O'Brien collided with a door causing $200 or $300 of damage thereto; he was discharged by Foreman Lang that evening at Skinner's request.

O'Brien conceded that the collision took place but claimed that Foreman Lang had instructed him earlier that day to speed up his operation of the fork lift truck and then, after the collision, criticized him for negligent operation of the vehicle. He claimed that Lang, who did not testify herein, told him upon his discharge that his work had been failing for several days and that "it wasn't entirely the door" incident that caused his discharge. O'Brien allegedly asked Lang "if it had anything to do with the Union, and I think he said something like no or partly or something. I don't remember now . . . ." O'Brien had previously operated the fork lift truck for two or three hours during a two or three-day period.

I see little support for the position of the General Counsel in the foregoing. Indeed, the General Counsel concedes that there is some substance to Respondent's contention that O'Brien was discharged for cause, but stresses other factors. And while Skinner did assign other reasons, including the distribution of union literature during working time, as heretofore set forth, Skinner did claim that the main reason was the fork lift truck incident. The preponderance of the evidence is, and I so find, that O'Brien was discharged on January 14, because of the fork lift incident and, but for the incident, would not have been discharged on that occasion. Accordingly, the record will not support a finding that he was discharged on January 14, because of his union activities.

O'Brien was reinstated on January 26 and again terminated on January 29, under circumstances described below, which the General Counsel contends warrant a finding of discrimination on the later date. Soon after O'Brien's first discharge, the Union concluded that he

and another employee, Norris, whose case was not litigated and was dismissed herein, as set forth above, had been discharged because of their union activities. On the morning of January 22, according to the testimony of International Representative Austin Smith of the Union, circulars which were intended for distribution among the employees of Respondent were prepared. Therein, the employees were urged to organize for better conditions and to protect themselves against discrimination such as that allegedly practiced against O'Brien and Norris. The circular also stated that unfair labor practices charges were being filed in the cases of O'Brien and Norris.[6] The employees were invited in the banquet room of a hotel in Caldwell.

There is a conflict, one of a number, in the case, between Skinner and Smith as to whether they lunched that day or the next at which time they discussed the cases of O'Brien and Norris. Smith a meticulous witness, testified that he lunched with Skinner on Thursday and requested that the two men be reinstated. Smith deemed Skinner's response to be equivocal, promptly telephoned his office and ordered that the circulars be distributed at the plant that day. They were distributed that afternoon to the employees as they left at the close of the shift.

According to Skinner, the luncheon took place on the following day, Friday, and, in response to Smith's request to reinstate the two men, he stated that O'Brien already had been reinstated. Although I am disposed to and do credit Smith's version that the talk took place

[6]The original charge filed on March 9, 1959 did not list O'Brien. His name was added in an amended charge filed in June subsequent to various other charges.

to attend a meeting that evening, Thursday, January 22,

on Thursday, I deem the date to be of no particular significance herein.[7] Presumably it is the General Counsel's purpose to show that reinstatement resulted from the Union's request, thereby establishing O'Brien's connection with union activity. It is equally logical, however, to deduce therefrom that this also reflected Skinner's lack of animosity toward the Union.

As found, O'Brien attended the union meeting on the night of Thursday, January 22, at the scheduled location and encountered Skinner in the adjacent bar. In a resulting conversation, according to O'Brien, Skinner offered him his former job. O'Brien declined, stating that he was not experienced in the operation of a fork lift truck and that he would return if he were placed as a welder, work with which he was familiar. Skinner replied that O'Brien's application had not disclosed this experience and immediately offered him a job as a welder. While the General Counsel stresses the fact that the application did show that O'Brien had been a welder in a prior job, this information is on the back of the application and O'Brien listed himself on the face thereof as a repairman. Furthermore, there is no evidence that Skinner ever read this application and it would seem that Skinner's statement, if made, was a gratutious one.

As found, Skinner did instruct O'Brien and Norris on the evening of January 22 to refrain from engaging in union activities in the plant, and the record warrants the finding that the statement was directed to O'Brien's

[7]Skinner admittedly told the two men on the night of the union meeting that he was reinstating them, but not because of the Union's "insistence." The union meeting took place on Thursday evening and this supports Smith's testimony that the Union's request for their reinstatement preceded the offer of reinstatement.

working time only and was so construed by him. Be that as it may, there is no evidence that O'Brien thereafter engaged in any further union activities in the plant where he worked but another four hours on January 26, as described below.

Skinner was schedule to depart that weekend for a business trip to California and advised Plant Foreman Brown that O'Brien would return to work as a welder. O'Brien did report for work on Monday morning, January 26, and was assigned to Foreman Pearl Lewis of the welding shop. O'Brien testified that Lewis gave him a copy of the plant rules with Rule 20 circled; apparently no comment was made by either man. O'Brien testified that he was ill when he reported for work that morning and at noon, four hours later, was too ill to continue. He asked Foreman Lewis if he could see the company physician and was referred to Plant Foreman Brown. The latter approved and O'Brien visited a company physician who gave him "nerve capsules" to quiet him down and commented that he might have the flu. Because of lack of funds, he did not adopt the physician's suggestion that he proceed to a Veterans Hospital at Boise.

To the contrary, O'Brien proceeded to his residence and went to bed where he remained for four days. He claimed that he called the plant on Tuesday morning and again on Wednesday and notified "them" that he would not be in; the record does not disclose whom he contacted on these occasions. He further testified that he called in on Thursday and was put through to Skinner who had just returned from California. The latter promptly told O'Brien that he was sorry; that Respondent could not "use you any more"; and that Foreman

Lewis as well as the other foremen did not want him. O'Brien further testified that "I believe it was on Thursday" that he spoke with Skinner.

This poses several conflicts which do not permit of precise resolution. As noted, Foreman Lewis was not available to testify. Plant Foreman Brown flatly contradicted the testimony of O'Brien that he gave notice of his departure on Monday, January 22, claiming that O'Brien said nothing to him about his illness and departure. He further claimed that Foreman Lewis had reported to him that evening that O'Brien gave him, Lewis, no notice of his departure.[8]

Brown was then confronted with Respondent's Exhibit 3, an official record of Respondent, consisting of a Change of Statuts report on O'Brien admittedly filled out by Foreman Lewis and dated January 29, wherein the latter wrote "upon being reinstated this man assigned to my department as a Welder. At 12:50 p.m., he stated he was unable to continue because he didn't feel well and left—." [Emphasis added]

Obviously, as the General Counsel points out, if this report is credited, it places Foreman Lewis in the position of contradicting Brown's testimony on a basic aspect of the case. The report continues on, however, to state "since he has not been in touch I consider it to be a voluntary termination." Thus, if the report is credited and a finding is made that O'Brien did give notice to Lewis on Monday, a cogent argument is presented, contrary to the position of the General Counsel, for a further finding that O'Brien did not contact Respondent again, or at least that no contact was made

[8]His testimony was received only as evidence of what Lewis reported to Brown and not as evidence of what O'Brien stated to Lewis.

with his immediate foreman. This further supports the testimony of Skinner that he did not return until Saturday and therefore held no conversation with O'Brien on the previous Thursday.

Still another disparity presents itself, shifting the tide momentarily in favor of the General Counse, in that Skinner signed a statement for an investigator of the General Counsel wherein he deposed that here turned from California on a Thursday; despite this, he thereafter maintained in his testimony that he had not written the statement, a reference to the transcription by the investigator, and that he did not return until the following Saturday. And this, of course, is not inconsistent with Respondent's Change of Status report which in effect is a statement that O'Brien never contacted Respondent after Monday.

Conclusions

As noted, the case of O'Brien is marked by many conflicts of testimony but the following factors are readily apparent.

(1) O'Brien's union activities were not outstanding prior to his original termination on January 14, 1959.

(2) No particular sustenance can be given to the position of the General Counsel from the fact that the Union interceded for him after his first discharge and that he was thereafter reinstated. The testimony involving the intercession by the Union is equally capable of supporting an inference that Respondent was not motivated by anti-union considerations.

(3) O'Brien did not thereafter engage in any union activities, at least not prior to his subsequent termination on January 29.

(4) While Foreman Lewis' statement refutes the testimony of Brown as to O'Brien's giving notice of his departure on January 26, and here as well as below in discussing the discharges of Jordon, I do not credit Brown's testimony, nevertheless, Lewis' affidavit proceeds to support testimony that neither Skinner nor other management representatives thereafter heard from O'Brien.

(5) In sum then, this record will not support a finding that the original discharge on January 14 was discriminatory and, although not entirely free from doubt, a preponderance of the evidence impels the same finding as to the January 29 termination. It is accordingly recommended that the case of O'Brien be dismissed.

D. The discharge of Elsworth Jordan[9]

Jordon was hired by Respondent as a maintenance man on or about February 1, 1959, following a chance meeting at the Stringbusters Lounge immediately following his attendance at a meeting of the Union. Jordon had recently left the employ of another concern in an allied field of manufacture which the Union apparently was attempting to organize and he was a member of the Union at the time. As set forth above, the meetings of the Union were held in a room adjacent to the Stringbusters Lounge or in a similar facility at a local hotel.

The rate of pay was agreed upon, Jordon was promised a raise of 30 cents per hour in three weeks and he was directed to report to work on the following morning. On so doing, as heretofore found, Skinner told Jordon that he did not want him to attend any union

[9]In the complaint his name appears as Ellsworth Jordon.

meetings, that he would be "blackballed" if he did so and that it would help if Jordon spoke against unionization. Jordon promised to have nothing to do with meetings of the Union while he worked for Respondent. Jordon adhered to his pledge until approximately mid-March; a change of heart resulted from the fact that he requested the promised pay raise from Skinner and the latter either rejected the request or put him off.

Prior thereto, on or about March 1, 1959, Skinner, as Jordon testified, accused him of attending union meetings contrary to his promise. Jordon, who in fact had not attended any union meetings since his pledge, denied the accusation. He changed his mind on March 17 when he resumed attendance of union meetings and he attended meetings on March 24 and March 31.

Skinner was present in the adjacent bar on the night of the March 17 meeting and, according to Jordon, conversed with him after the meeting. The record amply demonstrates that Skinner was fully familiar with the fact that a union meeting was being carried on at the time although his presence in the bar may well have been primarily social in nature.

Also relied upon herein by the General Counsel is the fact that Jordon signed a statement for a Board investigator on or about March 11, relating to the activity of the Union at his prior place of employment. On March 12, he informed Skinner of this act, although he did not recall whether Skinner questioned him about it or whether he volunteered the information.

Jordon did not recall seeing Skinner in the area at the March 24 meeting, but did observe him on March 31, although no conversation apparently took place. The last day that Jordon actually worked for Respondent

was Tuesday, March 31, according to Respondent's records, and he was thereafter terminated under the following circumstances.

On the morning of April, as Jordon uncontrovertedly testified, and I so find, Jordon telephoned the plant and spoke with his immediate superior, Foreman Lang, who customarily directed his work. He complained of a foot infection, obtained permission from Lang to be absent and the latter stated that he would notify Skinner of Jordon's absence. Skinner conceded that Jordon's superior, presumably Lang, had so notified him on April 1. Jordon's testimony was that on coming to work for Respondent, Skinner had instructed him to "call in" in case of absences and did not specify whom to call. I find that Jordon complied with the appropriate instruction both on this occasion as well as on the following day, described below. While Respondent attempted to claim that Jordon had in effect terminated himself, the record, as will appear below, warrants a finding that Jordon was discharged by Respondent on April 2; indeed Skinner so conceded in an affidavit submitted to a Board investigator.

On the morning of April 2, Jordon's feet were still troubling him. He telephoned the plant, as he testified; was connected with the office girl; and notified her that he would be absent that day as well. She agreed to notify his superior. Unlike the previous day which Jordon had devoted to soaking his feet in a manner previously prescribed by his physician, Jordon did visit a local physician that morning.[10]

[10]Skinner testified that Jordon called in only on April 1; he later admitted that Jordon might have called up on April 2, but did not speak with Skinner.

At approximately 1:30 p.m., while treating his feet at home, Jordon read the local paper and noticed an advertisement by a local employment agency for a maintenance man; he immediately realized in view of the smallness of the community, that this was manifestly his job. This advertisement was in an afternoon paper which hits the streets at approximately 2 p.m. The advertisement also appeared in the April 1 issue of the paper, as well as the April 2 issue, and Jordon believed that on this occasion he noticed it in the April 1 issue. It is actually immaterial herein which days' issue Jordon was reading because he promptly repaired to the plant and arrived at 2:30 p.m.

He saw Skinner, showed him the advertisement and asked if this meant that he was discharged. Skinner replied in the affirmative, according to Jordon, and stated that he had been taking off too much time and that he had been staying overtime to do his work; Skinner promptly gave him his paychecks.

Skinner claimed that he told Jordon he had not written a termination notice for him, but that he was looking for another maintenance man. Jordon persisted and asked if this meant that he was discharged. Skinner finally admitted that if Jordon stated it in that form, "that's the way it is." Skinner claimed that he had not decided to terminate Jordon as of that moment and contended that he had him in mind for another job at the plant. The fact is, however, that Skinner never mentioned this other position to Jordon at any time and I find, therefore, that Skinner discharged Jordon on this occasion.

Contentions and Conclusions

Initially, I believe that it is unnecessary to treat with

the multipilicity of contentions raised by Respondent herein in all their ramifications, because a partial consideration of them will readily demonstrate their lack of substance and intrinsic contradictions and serves rather to lend substantial support to the contentions of the General Counsel herein.

(1) Respondent developed evidence to the effect that Jordon was reprimanded, in a notice prepared by Skinner on March 30, 1959, for smoking and loitering in the restroom; it is not clear whether the incident took place on March 30 or prior thereto. The simple answer to this is that Skinner admitted it played no part in the decision to terminate Jordon.

(2) Skinner claimed that Jordon was lacking in all qualifications as a maintenance man. However, according to Jordon and I so find, Foreman Lang told him three weeks after he was hired that he was progressing satisfactorily and, in addiion, Skinner told him to keep up his good work. Jordon was never warned about the possibility of discharge and even Skinner testified only that he once told Jordon that he had to learn his job "better."

(3) Respondent adduced testimony to the effect that Jordon was absent a great deal whereas Jordon testified that he was absent only 2 half days during March with both absences authorized by Respondent. While Respondent's own exhibit, Jordon's Change of Status report prepared on April 13 subsequent to the date of his termination, states that Jordon's attendance was irregular, this very exhibit lists the hours that Jordon worked during March as 41, 36.5, 37.3 and 42 hours per week. This in my belief, and I so find, supports the testimony of Jordon. A further reference in the

exhibit to 16 hours presumably refers to the partial work week which ended the month and included the last 2 days that Jordon worked. Moreover, Jordon uncontrovertedly testified that he was never criticized for these 2 absences.

(4) While it would seem that Respondent was not dissatisfied with Jordon prior to the end of March, Respondent adduced considerable testimony concerning and incident on March 21, which allegedly demonstrates that Jordon was insubordinate and refused to cooperate because he did not finish a work assignment on that date. It is Respondent's claim, as testified by Skinner and Foreman Brown, that Jordon was called in on a Saturday morning to perform an urgent assignment, viz., relocating of certain pipes which were used as airlines; that Jordon actually worked about 2 or 3 hours; and that he then left with the project incomplete. It is claimed that Brown was required to finish the project himself that afternoon so that the new installation would be ready for use on Monday morning.

The testimony of Jordon is diametrically opposed to that of Respondent's two witnesses, as is that of his former co-worker James Taber. Both were in substantial agreement that they worked on this airline installation that morning; that after it was finished at approximately 10:30 or 11:00 a.m., Jordon told Brown that the project was finished and further that he was not feeling well; and that Brown, noting that the job was finished, authorized Jordon to leave for the day. Skinner's testimony with respect to this incident varied considerably. He originally testified that he did not know whether Jordon received permission to leave, but later claimed that permission was not obtained from

Brown or himself. There are, however, several further factors which demonstrate that the testimony of Taber and Jordon herein is the more reliable.

(a) It is conceded that although Jordon worked the rest of the month of March, consisting of the week of March 23 and 2 days on March 30 and 31, Respondent never mentioned this alleged dereliction to him. Although Jordon's termination notice which is in large measure couched in generalities such as refusing to cooperate in the work and not being qualified to do the job, became specific and cited work week hours in support of the claim, treated above and rejected, that Jordon was excessively absent during March, it was silent as to this episode.

(b) Jordon resided about 5 blocks from the plant, had a telephone and yet was not contacted on this day after his purported premature departure. If his presence was so urgently required, surely a contact could readily have been made and yet there is no evidence that any was attempted.

(c) The record uncontrovertedly discloses that Taber was instructed that Saturday afternoon to build tables after, as Taber claimed, the airlines project was complete. Taber claimed herein that he worked until noon on the tables and then left the plant upon completing this assignment. This not only tends to demonstrate that no afternoon work was performed, but significiantly is readily refutable by Taber's time record if his testimony were contrary to the fact; no such record was proffered herein. Moreover, if the airlines project was urgent but incomplete, why then was Taber permitted to work on the tables and not retained on the airlines. No answer consistent with Respondent's claim herein presents itself.

(d) As appears below, Skinner claimed that he had not decided upon the termination of Jordon at the time he appeared at his office on April 2. This is hardly compatible with the Change of Status report which purports to support a decision to discharge Jordon because of the March 21 incident.

(e) Respondent was not reluctant to issue a correction notice on March 30 reflecting Jordon's smoking and loitering in the restroom. It would readily seem that the March 21 incident, if it took place as Respondent claims, was as serious if not more so, yet no correction notice was issued and Skinner did not even know whether he spoke to Brown about reprimanding Jordon. Indeed, Skinner conceded that it could well be that no one mentioned this purported major derelection to Jordon. Even Brown, who was purportedly assigned to complete the task and had allegedly been reprimanded by Skinner for not completing the airlines project that morning, was unable to state whether he had ever mentioned the incident to Jordon.

(5) A consideration of the circumstances of Jordon's discharge and the variations in the testimony raises the suspicion that the termination notice of April 5 was an ex post facto document prepared by Respondent in an effort to bolster its position herein and was not a true reflection of Respondent's reason for terminating Jordon.

The document refers to Jordon as a trainee with Respondent from March 1 through April 13. The fact is that he started with Respondent well before March 1 and although the document may have been prepared on April 13 Jordon was not an employee at that time. The document further refers to Jordon being off "3 days straight" without notice to Respondent and Skinner tes-

tified in similar fashion. But it is undisputed that Jordon worked on March 31 and it obviously follows that he had been absent only one and one-half days at the time he appeared in the office on the afternoon of April 2. Moreover, as found, it is admitted that Jordon notified the appropriate authorities on April 1 with respect to his absence and, as found, he did likewise on April 2. Even here, Skinner, while claiming that Jordon did not have his permission to be absent, conceded that the permission of the plant foreman was sufficient and that he did not know whether Jordon had obtained it.

(6) Another inconsistency is the claim of Skinner that he realized within one or two weeks after Jordon was hired that he was not qualified as a maintenance man and decided to discharge him. Yet, Skinner further claimed that as of April 2, many weeks later, at the very moment Jordon entered his office with the advertisement for his replacement, he had not decided to terminate the man. Indeed, he allegedly had him under consideration for another post more suitable for him.

(7) Skinner contended that he did not intend to discharge Jordon and had him in mind for another post in the plant. But he did not offer him this or any other post or even mention it, and I, therefore, do not credit his testimony in this respect.

(8) Skinner testified that he contacted the employment agency which ran the advertisement a day or so before it appeared in the paper. He then testified that he might have contacted them 2 or 3 days before. Still later, in an obvious attempt to peg this to the Saturday incident of March 21, he testified that he either contacted the agency on Monday, March 23 or decided to make the contact on that date.

Totally aside from the obvious impossibility of reconciling this with the decision to terminate the man early in his employment, as well as the claim that there was no decision to terminate him prior to his appearance at the plant on April 2, this impels the conclusion that Respondent had decided to terminate Jordon prior to his absences on April 1 and April 2. The advertisement appeared in the April 1 issue of the paper and arrangements for the advertisement were surely made at the very latest on the morning of April 1, a date on which Jordon's absence was authorized. Indeed, it would seem that where Respondent was operating through an employment agency the contact of the agency was probably made prior to April 1.

The foregoing is highlighted by the fact that the March 21 incident so strongly relied upon herein by Respondent followed by only 4 days the occasion, on March 17, when Jordon disobeyed Respondent's instructions at the time of his hiring to refrain from union activities on penalty of punishment, proceeded to attend a union meeting, and was observed on the scene by Skinner. In view of this, together with the lack of substance to Respondent's contentions herein, I firmly believe, on a strong preponderance of the evidence, that Jordon was discharged because of his union activities.

I find that by discharging Elsworth Jordon on April 2, 1959, Respondent has discriminated with respect to the hire and tenure of employees within the meaning of Section 8(a)(3) of the Act. I further find that by the foregoing, Respondent has interfered with, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, within the meaning of Section 8(a)(1) thereof. However, I do not be-

lieve that there is substantial evidence in support of the allegation that Jordon's discharge was violative of Section 8(a)(4) of the Act and I shall therefore recommend the dismissal of that allegation.

IV. The effect of the unfair labor practices upon commerce

The activities of Respondent, set forth in Section III above, occurring in connection with its operations set forth in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The remedy

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that Respondent has discriminated with respect to the hire and tenure of employment of Elsworth Jordon. I shall therefore recommend that Respondent offer him immediate and full reinstatement to his former or substantially equivalent position without prejudice to seniority or other rights and privileges. See The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch, 65 NLRB 827. I shall further recommend that Respondent make him whole for any loss of pay suffered by reason of the discrimination against him. Said loss of pay, based upon earnings which he normally would have earned from the date of the discrimination to the date of the offer of reinstatement, less net earnings, shall be computed in the manner established by the Board in F. W. Woolworth Co.,

90 NLRB 289. See N. L. R. B. v. Seven-Up Bottling Co., 344 U. S. 344.

Because of Respondent's demonstration of its willingness to resort to unlawful methods to counteract an attempt by its employees to achieve self-organization through a labor organization of their own choosing, the inference is warranted that the commission of other unfair labor practices may be anticipated. It will therefore be recommended that Respondent be ordered to cease and desist from in any manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed by the Act. However, nothing in the recommended order is intended to require Respondent to rescind its insurance plan.

On the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. United Steelworkers of America, AFL-CIO, and Blue Mountain District Council, Lumber & Sawmill Workers, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

2. Kit Manufacturing Company is an employer within the meaning of Section 2(2) of the Act.

3. By discriminating in regard to the hire and tenure of employment of Elsworth Jordon, thereby discouraging membership in a labor organization, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By the foregoing, by threatening to shut down its plant in the event of union organization, by threatening employees with reprisals for engaging in union activities, and by promising and instituting benefits for employees in return for rejecting unionization, thereby

interfering with, restraining, and coercing employees in the exercise of the rights guaranteed by Section 7 of the Act, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce with the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not discriminated with respect to the hire and tenure of employment of Larry O'Brien, Jr.

7. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(4) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, I recommend that Respondent, Kit Manufacturing Company, Caldwell, Idaho, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in United Steelworkers of America, AFL-CIO or Blue Mountain District Council, Lumber & Sawmill Workers, AFL-CIO, or in any other labor organization of its employees, by discriminating in regard to hire or tenure of employment, or any term or condition thereof, except to the extent permitted under Section 8(a)(3) of the Act.

(b) Threatening to shut down its plant in the event of union organization, threatening employees with reprisals for engaging in union activities, or promising and instituting benefits for employees in return for rejecting unionization.

(c) In any manner interfering with, restraining, or coercing employees in the exercise of their right to self-

organization, to form, join, or assist any labor organization, to join or assist United Steelworkers of America, AFL-CIO or Blue Mountain District Council, Lumber & Sawmill Workers, AFL-CIO, to bargain collectively through representatives of their own choosing, to engage in concernted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Offer to Elsworth Jordon immediate and full reinstatement to his former or substantially equivalent position without prejudice to seniority or other rights and privileges and make him whole for any loss of earnings suffered by reason of the discrimination against him, in the manner set forth in the section above entitled "The remedy."

(b) Make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amounts of back pay under the terms of this recommended order.

(c) Post at its plant at Caldwell, Idaho, copies of the Appendix attached hereto. Copies of said Appendix, to be furnished by the Regional Director for the Nineteenth Region, shall, after being signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and maintained for a period of sixty (60) consecutive days thereafter in conspicuous

places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said Appendix is not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Nineteenth Region in writing within twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order what steps it has taken to comply herewith.

It is recommended that unless on or before twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order Respondent notifies the aforesaid Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring Respondent to take the action aforesaid.

Dated this 6th day of January 1960.

/s/ MARTIN S. BENNETT,
Trial Examiner.

Appendix

Notice of all employees pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not discourage membership in, or activity in behalf of United Steelworkers of America, AFL-CIO or Blue Mountain District Council, Lumber & Sawmill Workers, AFL-CIO, or any other labor organization of our employees, by discriminating in any manner in regard to hire or tenure of employment, or any term or condition thereof, except to the extent per-

mitted under Section 8(a)(3) of the Act.

We Will offer Elsworth Jordon immediate and full reinstatement to his former or substantially equivalent position, without prejudice to seniority or other rights and privileges, and make him whole for any loss of pay suffered as a result of our discrimination against him.

We Will Not threaten to shut down our plant in the event of union organization, threaten employees with reprisals for engaging in union activities, or promise or institute benefits in return for rejecting unionization.

We Will Not in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to join or assist United Steelworkers of America, AFL-CIO, or Blue Mountain District Council, Lumber & Sawmill Workers, AFL-CIO, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the National Labor Relations Act.

All our employees are free to become or remain, or refrain from becoming or remaining, members of the above-named or any other labor organizations.

KIT MANUFACTURING COMPANY
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

United States of America
Before the National Labor Relations Board

Case Nos. 19-CA-1742, 1766

KIT MANUFACTURING COMPANY

and

Case No. 19-CA-1815

UNITED STEELWORKERS OF AMERICA, AFL-CIO

and

BLUE MOUNTAIN DISTRICT COUNCIL, LUMBER & SAWMILL WORKERS, AFL-CIO

DECISION AND ORDER

On January 6, 1960, Trial Examiner Martin S. Bennett issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the

exceptions and brief, and the entire record in this proceeding, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[1]

Order

Upon the entire record in this proceeding and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Kit Manufacturing Company, Caldwell, Idaho, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in, or activity on behalf of, United Steelworkers of America, AFL-CIO, or Blue Mountain District Council, Lumber & Sawmill Workers, AFL-CIO, or any other labor organization of its employees, by discriminating in any manner in regard to hire, tenure, or any term or condition of employment, except to the extent permitted under Section 8 (a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959;

(b) Threatening to shut down its plant in the event of union organization, threatening employees with reprisals for engaging in union activities, and promising and instituting benefits for employees in return for rejecting unionization;

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[1]The Trial Examiner rejected the Respondent's contention that Elsworth Jordon, one of the alleged discriminatees involved herein, in effect had quit and found that Jordon was discharged by Ray Skinner, the Respondent's general manager. In so finding, the Trial Examiner relied, in part, on an affidavit made by Skinner and submitted to a Board investigator. The Respondent excepted to the use of the affidavit on the ground that it was not part of the record. We find, as did the Trial Examiner, that Jordon did not quit but was discharged. However, in so finding, we do not rely on the affidavit, but on evidence in the record credited by the Trial Examiner.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist United Steelworkers of America, AFL-CIO or Blue Mountain District Council, Lumber & Sawmill Workers, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the Act, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which, the Board finds will effectuate the policies of the Act:

(a) Offer to Elsworth Jordan immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings suffered by reason of the discrimination against him, in the manner set forth in the section of the Intermediate Report entitled "The remedy;"

(b) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social-security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the right of employment under the terms of this Order;

(c) Post at its plant at Caldwell, Idaho, copies of the

notice attached hereto and marked "Appendix."[2] Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region (Seattle, Washington), shall, after being duly signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof and be maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Nineteenth Region, in writing, within ten (10) days from the date of this Order, as to what steps the Respondent has taken to comply herewith.

It Is Hereby Ordered that the complaint herein be, and it hereby is, dismissed, insofar as it alleges any violations of the Act other than those found herein.

Dated, Washington, D. C. April 27, 1960.

BOYD LEEDOM,
Chairman

STEPHEN S. BEAN,
Chairman

[Seal] JOHN H. FANNING,
Member.
National Labor Relations Board.

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[2]In the event this Order is enforced by a decree of a United States Court of Appeals, the notice shall be amended by substituting for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

Appendix

Notice To All Employees Pursuant To a Decision And Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not discourage membership in, or activity on behalf of United Steelworkers of America, AFL-CIO, or Blue Mountain District Council, Lumber & Sawmill Workers, AFL-CIO, or any other organization of our employees, by discriminating in any manner in regard to hire or tenure of employment, or any term or condition thereof, except to the extent permitted under Section 8 (a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

We Will Not threaten to shut down our plant in the event of union organization, threaten employees with reprisals for engaging in union activities, or promise or institute benefits in return for rejecting unionzation.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist United Steelworkers of America, AFL-CIO, or Blue Mountain District Council, Lumber & Sawmill Workers, AFL-CIO, or any other organization, to bargain collectively through representatives to their own choosing, and to engage in concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the Act, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act, as modified

by the Labor-Management Reporting and Disclosure Act of 1959.

We Will offer Elsworth Jordon immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay suffered as a result of our discrimination against him.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of the above-named Unions or any labor organization, except to the extent that this right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

KIT MANUFACTURING COMPANY
(Employer)

Dated———— By ————————
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

KIT MANUFACTURING COMPANY,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.116, Rules and Regulations of the National Labor Relations Board —Series 8, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board and known upon its records as Case Nos. 19-CA-1742, 19-CA-1766 and 19-CA-1815. Such transcript includes the pleadings and testimony and evidence upon which the Order of the Board was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Stenographic transcript of testimony taken before Trial Examiner Martin S. Bennett on September 15 and 16, 1959 together with exhibits introduced in evidence.

(2) Joint motion of parties to correct transcript of record, received October 20, 1959, together with motion in support thereof.

(3) Trial Examiner's telegrams, dated October 21, 1959, advising motion to correct transcript granted.

(4) Trial Examiner Bennett's Intermediate Report and Recommended Order dated January 6, 1960.

(5) Respondent's exceptions to the Intermediate Report and Recommended Order received, February 1, 1960.

(6) Decision and Order issued by the National Labor Relations Board on April 27, 1960.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 23rd date of September, 1960.

/s/ OGDEN W. FIELDS,
[Seal] Executive Secretary,
National Labor Relations Board.

Official Report of Proceedings
Before the
National Labor Relations Board

Certificate

This is to certify that the attached proceedings before the National Labor Relations Board in the matter of:

Name of Proceeding: Kit Manufacturing Company Caldwell, Idaho.

Docket No. 19CA1742, 1766 & 1815.

Place of Hearing: Canyon County Courthouse Caldwell, Idaho.

Date of Hearing: September 15 & 16, 1959, were had as herein appears, and that this is the original transcript thereof for the files of the National Labor Relations Board. [1]*

PROCEEDINGS

Trial Examiner Bennett: The hearing will be in order. This is the formal hearing before the National Labor Relations Board, in the matter of Kit Manufacturing Company, cases 19CA1742, 1866 and 1815. The Trial Examiner conducting the hearing is Martin S. Bennett. I will ask counsel and other representatives to state their appearances for the record.

Mr. Henderson: I am Charles M. Henderson, 19th Region, 327 Logal Building, Seattle, Washington.

Mr. Smith: Austin Smith, representing United Steel Workers of America, 412 American Legion Building, Spokane, Washington, and for the purpose of receiving all formal papers in this matter, including the Trial Ex-

*Page numbers appearing at top of page of Original Transcript of Record.

aminer's Intermediate Report, Mr. Emil E. Nerrick, Assistant General Counsel, United Steel Workers of America, Pittsburg 22, Penn.

Trial Examiner Bennett: For Correspondent?

Mr. Weston: Ely A. Weston, 711 and one-half Bannock, Boise, Idaho, representing Kit Manufacturing Company.

Mr. Henderson: Mr. Examiner, I should also state, in connection with the appearances, that Mr. Weller, of the Lumber and Sawmill Workers, will be here presently, and I assume at that time he can make his appearance for the record. [4]

* * * * *

Mr. Henderson: Then I would like to introduce . . . to present the General Counsel's formal papers which are rather voluminous, which are as follows: [5]

General Counsel's exhibit 1-A, the original charge in case No. 19CA1742; 1-B, Affidavit of service; 1-C, original charge 19CA1742; 1-D, Affidavit of service; 1-E, original charge 19CA1815; F, the affidavit of service; G, is the original complaint; a consolidated complaint, with the Order consolidating the cases and Notice of Hearing, and at that time it was only 19CA3242 and 3266.

(Reporter asks counsel to repeat last numbers)

Mr. Henderson: 19CA, capital "C" and Capital "A," 3242 and 3266. H, is affidavit of service; I, is an Order extending time for filing answer; J, affidavit of service, and K, is an answer to the consolidated complaint; 1-L, is an Order rescheduling the hearing to July 29, 1959, and the affidavit of service; 1-N, is the amended charge in case No. 19CA1742; 1-O, is the affidavit of service; 1-P, is the amended, consolidated complaint. It

still relates only to cases No. 19-CA-1742 and 1756; 1-Q, is the affidavit of service of that; 1-R, is the answer to the amended, consolidated complaint; 1-S, is the request by Respondents for rescheduling the hearing to September 15; 1-T, Order rescheduling hearing to September 15th; today; 1-U, affidavit of service; 1-V, second amended, consolidated complaint, which is in all three of our cases, 1742, 1756 and 1815; 1-W, affidavit of service; 1-X, Order extending time for filing answer; 1-Y, affidavit of service, and 1-Z, answer to the second amended, consolidated complaint. [6] Mr. Weston, I think, has had a chance to examine these papers and I offer them in evidence.

Mr. Weston: No objections.

Trial Examiner: I'll receive them.

* * * * *

At this time, I would like to move to dismiss the complaint as to Archie Murray and Lyle Howard, which would involve, I should imagine, striking paragraphs seven and eight of the complaint, and deleting the names of Murray and Howard from paragraph eleven. I should like to explain that the reason that I am moving to dismiss as to these two individuals, is because neither of them is in town at the moment. [7]

* * * * *

Trial Examiner Bennett: All right, the motion is granted. [8]

* * * * *

Mr. Henderson: At this time, Mr. Examiner, Mr. Weller of the Lumber and Sawmill Workers of the Blue Mountain District, I think, is here. And I think he wants to enter an appearance here.

Trial Examiner Bennett: Will you state your name and address for the record?

Mr. Weller: E. A. Weller, representative of the Brotherhood of Carpenters, Box 8, Baker, Oregon.

Mr. Henderson: Mr. Russell Chandler also of the Carpenters I think wants to enter an appearance as well.

Trial Examiner Bennett: Have him do so then.

Mr. Henderson: Tell the reporter your name and address.

Mr. Chandler: Russell Chandler, secretary-treasurer of the Blue Mountain Council, District Council, Post Office Box 387, Baker, Oregon. [9]

* * * * *

Direct Examination by Mr. Charles H. Henderson

ELSWORTH FRANKLIN JORDON

* * * * *

Q. When did you go to work for the Kit Manufacturing Company?

A. In February of this year.

Q. Prior to that time, where had you been employed?

A. Fleetwood Trailer Company factory. [12]

* * * * *

Q. And while you were at the Fleetwood, were you a member of any Union?

A. I was.

Q. Which Union was that?

A. United Steel Workers of America.

Q. And besides being a member of United Steel Workers had you engaged in any other activities for the Union? A. Yes.

* * * * *

(Testimony of Elsworth Franklin Jordon.)

Q. Before you left Fleetwood and were employed at the Kit Manufacturing Company did you do such things as distributing cards or literature or anything like that?

A. You mean for Fleetwood?

Q. I mean at the Fleetwood plant?

A. Yes.

Q. What did you do?

A. Passed out cards and I got guys to join the Unions.

Q. Did you go to the Union meetings?

A. Yes.

Q. Now who hired you at Kit?

A. - Mr. Skinner.

Q. I see. Do you recall what day it was or about when [12A] it was that he hired you?

A. It was one night at the Stringbusters Lounge, more or less, in February. I don't recall what date, but it was around the first of February.

Q. Yes, and was that on the occasion of a Union meeting?

A. Yes it was.

Q. Where was the meeting held?

A. It was held in the Roundup Room at the Stringbusters Lounge.

Q. And when I say Union, I'm referring Union meetings which you attended. Now which Union was that?

A. That was the Steel Workers.

* * * * *

(Testimony of Elsworth Franklin Jordon.)

Trial Examiner Bennett: You were hired on a particular night around the first of February?

A. Yes. somewhere around the first of the month. I din't recall which day it was.

Trial Examiner Bennett: You weren't working at that time?

A. No sir. I just quit Fleetwood then.

Q. (By Mr. Henderson): How did you happen to be talking to Mr. Skinner that night at the Stringbusters Lounge?

A. Well, Mr. Skinner and a whole bunch of guys was sitting around a table, and I come up to the meeting and I came up to the table and got to talking to them.

Trial Examiner Bennett: Had you known him preiously? [13]

A. No, I hadn't.

* * * * *

Q. (By Mr. Henderson): What was your discussion about?

A. It was about Unions and he was telling the guy what he could do for them and what he couldn't do.

* * * * *

Q. Did you take any part in the conversation about the Unions?

A. I did.

Q. What did you say?

A. Well, I said "Ray, if he could do so much for the [14] guys," I asked if he could top what I was getting over at Fleetwood, and he said he could.

* * * * *

(Testimony of Elsworth Franklin Jordon.)

Q. And this conversation where he hired you, was any mention of any Union or Union activities?

A. Well, he said if he hired me that he didn't want to have anything to do with the Unions whatsoever, and we had a pretty big argument there for a while about that. [15]

* * * * *

Q. Do you recall whether or not it came up in the conversation which you had with him at that time?

A. I told him that I had signed a deal for the N.L.R.B. at Fleetwood.

Q. Well, I'm talking about the conversations in the Stringbusters Lounge in February.

A. Well, he knew that I had been going to meetings and all that.

Trial Examiner Bennett: How did he know that?

A. Well, two or three meetings when we would come out of the meetings, Mr. Skinner would be there.

Trial Examiner Bennett: And this was while you were at Fleetwood?

A. Yes, we came from Fleetwood over here to talk to the guys at Kit.

Trial Examiner Bennett: And where was the Steel Workers meetings usually held?

A. For Fleetwood or Kit?

Trial Examiner Bennett: Well, for Kit.

A. Well, they started off at the Saratoga room in the Saratoga Hotel and later they had them at the Roundup room at the Stringbusters Lounge, and that's when I started.

* * * * *

(Testimony of Elsworth Franklin Jordon.)

Q. (By Mr. Henderson): Was this meeting that you're [16] talking about when Mr. Sinnner hired you, was that the first meeting that you had been to at the Stringbusters or had you been to others before that?

A. No, I had been to others before.

Q. Do you recall whether Mr. Skinner had been in evidence on those occasions?

A. He had been around the bar and seen us when we come out of the meetings, yes.

* * * * *

Q. (By Mr. Henderson): Do you recall, incidentally, what your rate of pay was to be when you went to work for Kit? [17]

A. He said he would start me off at a dollar and a half an hour and raise me to a dollar and eighty cents in three weeks.

Q. Did you go to work for Kit?

A. I did.

Q. When did you go to work?

A. In February.

Q. How soon after the night we have been talking about?

A. The next day Mr. Skinner asked me to come over to his office; the next morning.

Q. I see. And did you go over to his office?

A. Yes.

Q. Did you have a conversation with him at that time? A. Yes.

Q. What was said at that conversation?

A. We went into his office and we set in there and we talked and he told me what job he was going to give me, and he said if I had anything to do with any

(Testimony of Elsworth Franklin Jordon.)

Union while I worked for Kit that he would blackball me from Kit.

Q. Incidentally, what was your job going to be there at Kit?

A. Maintenance man.

Q. Did he say anything else about the Unions?

A. You mean the next morning?

Q. Yes. In the conversation in his office? [18]

A. I don't recall, it's been so long.

Q. Did he say anything about Union meetings?

A. He said he didn't want me to attend any Union meetings, and that he wasn't telling me to but it would help if I talked against the Unions.

Q. And incidentally, what did you say to all that?

A. I told him I wouldn't have anything to do with any Union meetings while I was working there.

* * * * *

Q. Up until say the middle of March, did you go to any Union meetings?

A. I did not.

Q. And what was your rate of pay at that time?

A. $1.50 an hour.

Q. Now you have referred to Mr. Skinner's promise that you would be raised to $1.80 after some period of time. That was within three weeks, did you say?

A. Yes.

Q. Were you raised that $1.80? [19]

A. No I wasn't. I went and asked Ray for the raise and he said, "I'll raise you, I'll raise you off your butt on your feet if you don't get back to work."

(Testimony of Elsworth Franklin Jordon.)

Q. And you were not raised to $1.80 an hour?

A. No, I wasn't.

* * * * *

Q. After that, did you attend any Union meetings?

A. I did.

Q. Specifically, do you specifically recall which ones you attended?

A. The first one was March 17.

Q. And how many after that?

A. It was two more in March, one the 24th and one the 31st.

* * * * *

Trial Officer Bennett: As I understand it, you went to your first Union meeting after this conversation with Mr. Skinner that you just told us about?

A. Yes. [20]

* * * * *

Q. (By Mr. Henderson): Prior to March the 17th did you have any . . . . or do you recall having any conversation with Mr. Skinner at which the subject of your attending Union meetings came up?

A. The night after the meeting broke up, I remember talking to Mr. Skinner.

Q. Now are you referring to the meeting on March the 17th? A. Yes.

Q. No, I mean prior to that time. Did any conversation in the plant take place? Do you recall any?

A. Well, it was when Mr. Skinner told me that he heard that I had been going to Union meetings.

Q. What did you say to that?

A. I told him that I had not been going to any Union Meetings.

(Testimony of Elsworth Franklin Jordon.)

Q. And up to that time, had you been going to any Union meetings? A. No.

Q. Can you pin that down at all? Can you remember about when it was that he asked you that question?[22]

A. No, I don't recall but it was about the first of March anyway.

Q. Do you recall where it was?

A. It was inside the plant over there near the time clock.

Q. Now you have already testified that you attended Steel Workers meetings on March 17, 24 and 31st?

A. Yes.

Q. Where were the meetings held?

A. In the Stringbusters Lounge in the Roundup room.

* * * * *

Q. And was Mr. Skinner in evidence at any of those meetings?

A. He was at the 17th, when I came out of the meeting.

Q. Where was he?

A. At the Stringbusters Lounge.

* * * * *

Trial Examiner Bennett: This meeting that you held in the Stringbusters Lounge, was this a group of you at a table or what was it?

A. They have a special room at the back where they rent it out for Union meetings and social parties and things like that, and they have a big table in there just like that. [23] (indicating counsel table). [24]

* * * * *

(Testimony of Elsworth Franklin Jordon.)

Q. Well, let's see. You say that Mr. Skinner was in the bar the night of March 17th meeting?

A. Yes.

Q. Did you have any other conversation with Mr. Skinner that night?

A. I remember talking to him, yes. [25]

* * * * *

Q. How about the March 31st one?

A. I believe he was at the 31st one. I'm pretty sure he was.

* * * * *

Q. Incidentally. . . .now, while you were working there as maintenance man at Kit, who did you report to? Who was directing your work?

A. I believe his name is Chick Lang or something like that.

* * * * *

Q. (By Mr. Henderson): During a couple of months February and March, while you worked there, did Mr. Lang ever [26] discuss your work with you?

A. Well, there was one time that he said I was getting along pretty good with my work but that I had a little bit to learn about electrical maintenance, but as far as that I was doing fine.

Q. Did he ever cirticize your work?

A. No, sir. He didn't.

Q. I'll ask the same question about Mr. Skinner or any other representatives of Kit Manufacturing?

A. I recall Mr. Skinner down at the Stringbusters one night, he told me that I was doing a pretty good job, so just to keep it up.

(Testimony of Elsworth Franklin Jordon.)

Trial Examiner Bennett: How long had you been there when he said that to you?

A. Oh I think I had been there about three weeks, I would say.

* * * * *

Q. (By Mr. Henderson): Well now, how about your conduct. Were you ever criticized about that?

A. Mr. Skinner said that I had been smarting off to the formans which I don't recall smarting off to any of the formans that I took orders from, and I took orders from all of them.

* * * * *

Q. Did Mr. Lang or Mr. Skinner or any other representa[27]tive of Kit Manufacturing ever warn you that you might be discharged?

A. No, not that I recall.

* * * * *

Q. Were there any days when you were not present, say for the whole day or half a day?

A. Yes, I took off two half days during that March.

Q. And what did you do about notifying the company when you did that?

A. Well, the first day when I took off I asked Mr. Lang if I could take a half day off, that I had a bill come up from Montgomery Wards to pay them off, so I went and borrowed the money to pay them off because they were coming up to garnishee my wages.

Q. Now you say that you explained that to Mr. Lang?

A. Yes, I did.

Q. What did he say?

A. He said that it was o.k.

Q. What was the other half day? [28]

(Testimony of Elsworth Franklin Jordon.)

A. I took my baby to the doctor in Homedale.

Q. Who did you speak to about that if anyone.?

A. I think it was Mr. Lang again.

Q. Now what did he say at that time?

A. He said it was o.k. I think he said on the last one that he'd ask Ray about it. Anyway, he came back and told me it was o.k. if I went.

Q. When you say Ray, you mean Ray Skinner?

A. Yes.

* * * * *

Q. (By Mr. Henderson): Do you recall anyone from the management ever talking to you and giving you a warning or criticizing you about your attendance?

A. No sir, I don't recall that.

* * * * *

Now directing your attention to April the 1st, did you work on that day? A. No sir, I did't.

Q. Had you worked the day before that?

A. Yes. [29]

Q. Why didn't you work on April the 1st?

A. I went to the doctor for my feet.

Q. You have a foot condition?

A. Yes, I do.

Q. And what notice did you give the company about going to the doctor?

A. I called in that morning and talked to Mr. Lang and he said it would be o.k., that he would tell Mr. Skinner.

Q. What did you go to the. . . .did you go to the doctor that morning? A. Yes, I think I did.

Q. Did you go that day or the next day?

(Testimony of Elsworth Franklin Jordon.)

A. I think it was the next day that I went to the doctor.

Q. What did you go about, was it your foot on April 1?

A. I have some of these little pills that I had gotten from another doctor which you soak your feet in. I don't recall the name of them but they leave a sort of a blue stain on your feet. Creates perspiration and all.

Q. So that day you soaked your feet you say, but how about the next day? Was your foot any better?

A. No, they wasn't.

Q. Did you work the next day then?

A. No, I didn't.

Q. What did you do about calling the company or letting [30] the company know that you were not going to work on April the 2nd?

A. I called in on April the 2nd and the girl in the office answered th phone and she said o.k., that I'll tell them.

Q. Do you recall her name?

A. No, I don't, but I think she's the personnel girl.

Q. Do you recall what words she used? Did she say, "I'll tell Mr. Skinner or Mr. Lang" or "I'll just tell them"?

A. I think she said that I'll tell them was what she said.

Q. Now on that date did you go to the doctor?

A. I believe I went that day, yes, but I'm not positive.

Q. Which doctor was that?

A. Doctor Shanahan. [31]

* * * * *

(Testimony of Elsworth Franklin Jordon.)

Q. Did you later on that day, did you go to the plant?

A. Yes, I did.

Q. Was that before or after you had seen the doctor, or do you recall? A. I don't recall that.

Q. Why did you go to the plant?

A. Well, I was settin' at home and I seen a news clipping in the local paper saying that they wanted sheet metal men and a maintenance man at Kit Manufacturing Company and I cut the clipping out and took it over, and I asked Mr. Skinner about it; I told him I called in both mornings at the desk. . . .

* * * * *

Trial Examiner Bennett: Will you fix the time of that?

A. I believe it was around 2:30 or something like that.

Trial Examiner Bennett: Now, this is on the afternoon of April the 2nd? A. Yes. [32]

* * * * *

Mr. Henderson: That's what I proposed to bring out in his testimony. Mr. Jordon, this is General Counsel's Exhibit No. 2 for identification which I am now handing to you, will you tell us here briefly what it is and particularly the newspaper clipping attached to the piece of yellow paper?

A. This is the same clipping that I took to Mr. Skinner. [33]

* * * * *

Q. (By Mr. Henderson): Now Mr. Jordon, what was it about this piece of paper, which you were concerned about, which made you go in to see Mr. Skinner?

(Testimony of Elsworth Franklin Jordon.)

A. Well, the maintenance man's job, that's my job, at the plant, and I went in and asked Mr. Skinner about it, and I asked Mr. Skinner and he said, "Jordon, you. . . ."

Q. Now wait just a minute before you get into the conversation. Let me pin this down a little more. This [34] clipping was in what paper?

A. I don't know whether it was the Tribune or the Caldwell Times, but I was taking both of them at the same time.

Q. Now which is the morning paper and which is the evening paper?

A. They're both evening papers.

Q. I see. Neither paper comes out in the morning then?

A. No, it comes out, I think, around two o'clock in the afternoon.

Q. When did you read it?

A. I read it, oh, I would say around one something, one thirty, I think.

Q. On April 2nd? A. Yes.

Q. Yes.

A. No, I read it. . . .yes, it was on April the 2nd.

Q. The same day that you saw Mr. Skinner?

A. Yes.

Trial Examiner Bennett: You say you went to see Mr. Skinner, did you bring the clipping along with you?

A. Yes.

Q. Did you show him the clipping? A. Yes. [35]

Q. Well, tell us the conversation between you and Mr. Skinner at that time?

(Testimony of Elsworth Franklin Jordon.)

A. Mr. Skinner said I had been terminated, that I was taking off too much time.

Q. Just a minute, how did the conversation start?

A. I asked him what the deal was on that and if I was fired.

Q. What did he say?

A. He said, "Yes, Jordon, you have been determined."

* * * * *

Mr. Henderson: He means terminated. What did he say after that and what did you say?

A. I asked him what the reason for it was and he said "You've been taking off too much time and you have been staying over time to do your work." I think he was referring to one Saturday that we had to lift the pipe off the floor and put it overhead. It was an air line and I had to come in that Saturday and do it, and I think he was referring to that time.

Q. Did you make any explanation to him at that time of that incident?

A. No, I don't believe I did, sir.

* * * * *

Q. Did he refer to anything else or any other reason for terminating you, in that conversation? [36]

A. No sir, I don't recall of any.

Q. Did he criticize the quality of your work?

A. He never said anything more than that to me then and he went in and got my checks. [37]

* * * * *

Q. Well now, you stated, I think, something about his giving you your checks or having your checks made out. What happened in that respect?

(Testimony of Elsworth Franklin Jordon.)

A. Well, Mr. Skinner called the girl in the office and said, "Get Jordon's checks for him," and I told him I had to get my tools at the plant, and after he handed me the checks we walked back through the plant and I got my tools. [38]

* * * * *

Cross-Examination by Mr. Weston [40]

* * * * *

I'll ask the question a little differently. As a maintenance man, you would be called upon to correct or repair any electrical defect, is that correct?

A. Yes.

Q. Could you re-wind a motor, for example?

A. No sir. They took all the motors. . . .

Q. I just want you to answer my question.

A. No sir, I didn't.

Q. Then you couldn't re-wind a motor then?

A. No, I can't.

Q. Do you have a knowledge of blueprints and the methods by which motors and electrical equipment are taken down and put together again? A. No sir.

Q. Have you ever had any training in that line?

A. No sir.

Q. Well, what about plumbing? Could you do any plumbing?

A. Yes, I could do a little plumbing.

Q. Have you ever qualified as a plumber?

A. No sir. [43]

* * * * *

Trial Examiner Bennett: You were asking him if he

(Testimony of Elsworth Franklin Jordon.)

had to have a knowledge of a little of everthing in the plant in order to be a maintenance man.

A. (By witness): Yes.

Q. (By Mr. Weston): So in order to qualify as a maintenance man, you would have to be able to correct anything that went wrong in the plant whether it was electrical, [44] plumbing, engineering or anything in the plant.

A. To a certain extent, yes.

* * * * *

Q. But you never worked as a maintenance man before? A. No sir, I haven't.

Q. I would like to go back, Mr. Jordon, just a minute if I may to this conversation you had with Mr. Skinner when he hired you to come over and work for Kit Manufacturing Company. I believe you stated that he said that he could give you a job over there and start you out at $1.50 and raise you to $1.83?

A. No, $1.80.

* * * * *

Q. And in this discussion with you he suggested that [45] he wished you would have nothing to do with the Union, is that right? A. Yes.

Q. And that was agreeable to you? A. Yes.

Q. Were you perfectly sincere about that?

A. Yes.

Q. You intended to completely abandon the Union at that time?

A. Yes. If he had stuck to his promise.

* * * * *

Trial Examiner Bennett: You said that when you

(Testimony of Elsworth Franklin Jordon.)

had this conversation, I thought you said when you had this conversation you were not working at Fleetwood?

A. Well, I quit the day before.

Trial Examiner Bennett: The day before the conversation with Skinner? A. Yes. [46]

* * * * *

Q. As a matter of fact, three days before you discharge or laid off, you hadn't worked those three days had you?

* * * * *

Q. Did you ever get a clearance from Mr. Skinner or Mr. Lang to stay home these days when you stayed the full days?

A. I did the first from Mr. Lang and from the girl in the office on the second time.

* * * * *

Q. But you knew that you were supposed to get your release from your supervisor, of course.

A. Well, I called in and none of them was around.

Q. That isn't answering my question.

A. Well, if he's not there I wouldn't get one.

Q. Do you recall or [48] do you know what the rules of the company were in regard to getting time off?

A. Yes.

Q. Do you have one of these little pamphlets here? (indicating pamphlet in hand)

A. No, I never got one of those.

Q. But you did get one of these pamplets?

A. Yes, I did know that. I know you're supposed to call in in the morning.

Q. To get a release from your supervisor?

(Testimony of Elsworth Franklin Jordon.)

Trial Examiner Bennett: I don't think he finished the answer.

A. (By witness): Nobody told me that it had to be the supervisor or anything, they just said you just call in and tell them so they'll know you won't be there.

* * * * *

Now I believe that you testified here just a few minutes ago that you know that you were supposed [49] to report to your supervisor when you took time off. Now is that or is that not true?

A. No sir. I don't recall that. I know when I first went to work there that Mr. Skinner told me the rules and he said to call in so I'll know you won't be there.

Q. So he'll know? A. Yes.

* * * * *

Q. Now Mr. Jordon, were you ever criticized for smoking and loitering around the rest rooms?

A. Yes. [50]

* * * * *

Q. Were you warned about that?

A. Yes.

Q. Were you asked to sign a correction notice?

A. Yes.

Q. Did you refuse to do that? A. Yes.

* * * * *

A. I don't recall of any.

Q. You can't recall it?

A. No sir.

Q. But there might have been?

A. I wouldn't say there was.

Q. But you don't recall?

(Testimony of Elsworth Franklin Jordon.)

A. I don't recall telling them I wouldn't do anything.

Trial Examiner Bennett: So the witness is clear on this, there is a difference in saying that you don't recall something and on the other hand saying something did not happen.

A. Well, I don't remember then.

Q. (By Mr. Weston): Did you ever report to Mr. Skinner or any of the supervisors of the company that you had this foot ailment? [51]

A. No sir.

* * * * *

Q. Do you know, Mr. Jordon, that the company has a doctor to which they refer their employees?

A. Yes, I know they do.

Q. And you never asked to be referred to that doctor?

A. No sir, because I had my own doctor.

Q. I believe you testified that one of the times that you took the day off was to take care of a garnishment action? A. Yes.

Q. What was that about? The garnishment of your wages out there a Kit?

A. Well, he came to my house and gave me a warrant to appear in court in, I think, 20 days, or straighten it up and I asked Mr. Lang if I could take off and straighten it up, and I went and borrowed the money to pay it off.

Q. You took time off from the Kit Manufacturing Company to handle this personal matter?

A. Yes, Mr. Lang give me the time off. [52]

* * * * *

Q. Now this Stringbusters meeting place, apparently that is a place where they not only have meetings they all

(Testimony of Elsworth Franklin Jordon.)

go down and have a few drinks? A. Well. . . .

Q. Well, what is the Stringbusters anyway?

A. It's a lounge.

Q. It's a lounge? A. Yes.

Q. Do you have some of your official meetings there once in awhile?

A. In the room in the back of the lounge, yes.

* * * * *

Q. So you would be meeting in the back room while Mr. Skinner could be out in the other room?

A. He could be out at the bar, yes.

Q. Is there a bar out in the other room?

A. Yes, when you come into the Stringbusters, you come [55] into the restaurant and then you have a lounge back here, a bar and a Round-Up room is back further.

Q. Back further is the Round-Up room?

A. Yes.

Q. The Round-Up room is back further and that's where you had your official meetings? A. Yes.

Q. Is that the only place you had meetings?

A. No sir, we had meetings at the Saratoga Hotel. That's when I was working for Fleetwood.

* * * * *

Q. How many meetings did they have down at the Stringbusters?

A. I don't know. I just know the last three I went to.

Q. What was the first meeting that you went to after going to work for Kit?

A. It was March 17th.

(Testimony of Elsworth Franklin Jordon.)

Q. I believe you testified after some of these meetings down at the Stringbusters that you would come out and Mr. Skinner would be there sitting in the lounge?

A. Yes [56]

* * * * *

Q. And you would discuss Union matters with him?

A. Yes, I think we all did.

Q. Now just one more question, Mr. Jordon. I know this may be difficult to answer, but can you think back and give us a little more accurate date as to the exact day you were terminated out there? Wasn't it after April the 5th?

A. It was April the 2nd.

* * * * *

Redirect Examination by Mr. Henderson [57]

* * * * *

Q. Now as to the practice in the plant of calling in and such as that, Mr. Weston asked you some questions about this. Did you ever. . . .did Mr. Skinner ever tell you what you were supposed to do about calling in if you weren't going to be at work? [58]

A. The morning I was in the office, all I recall that Mr. Skinner said was "If you're not going to be here, Jordon, just call in."

Q. Call in? A. Yes.

Q. Did he tell you whom to call?

A. No, because I didn't know which one was my boss—Skinner or Mr. Lang.

Q. Well, Mr. Weston asked you the same question, did he tell you to call any specific person?

A. No sir.

(Testimony of Elsworth Franklin Jordon.)

Q. Now there may be some confusion here as to exactly what specific date it was that you were hired. Did the company ever give you any notice indicating your termination? A. They wouldn't give me one.

Q. So you don't know what's in the record about that? A. No sir, I don't.

Q. But how many days had you been off before you went in to see Mr. Skinner with the clipping in your hand?

A. That was the second day that I was off.

Trial Examiner Bennett: I believe that you said you were home the first day soaking your foot. Is that right?

A. Yes.

Trial Examiner Bennett: And the second day you went to the doctor? [59]

A. I went to the doctor and that evening after I received the clipping in the paper, I took it over to Mr. Skinner, yes.

Trial Examiner Bennett: Is it the same day that you went to see the doctor that you went over and took the clipping to Mr. Skinner? By evening you mean that afternoon?

A. Yes, that afternoon was when I went over to see Mr. Skinner. [60]

* * * * *

Q. Mr. Examiner, I hate to belabor this point but I feel that I must ask one or two more questions to clarify this question of taking time off, if I may. I want to ask you this question, Mr. Jordon. The time that you discovered this article in the newspaper was when you had already taken two days off or in your second day off?

A. Yes, it was in the second day. [61]

* * * * *

(Testimony of Elsworth Franklin Jordon.)

Q. Now up to the time when you asked for the $1.80 an hour and had been refused, can you give an approximation of that date again?

A. No sir, I can't.

Q. Well, I think you have testified that it was somewhere along in March.

A. Yes, March.

Q. The 17th or 18th of March or in that area?

A. No sir, it was before then.

Q. But you, up to that time, you hadn't taken any days off without consent, had you?

A. No sir.

Q. You weren't too happy when you didn't get the $1.80, were you?

A. No sir, I wasn't.

Q. And you decided to start going back to the Union meetings again? A. Yes. [62]

* * * * *

Direct Examination By Mr. Henderson

BILLY WILLIAMS [63]

* * * * *

Q. (By Mr. Henderson): Were you working for Kit last winter? A. Yes.

* * * * *

Q. (By Mr. Henderson): Now there has been some testimony here as to some conversations after a Union meeting between Mr. Skinner and Mr. Jordon? Were you present at that conversation? A. I was.

Q. Do you recall Mr. Skinner . . . do you recall the subject of a job for Jordon coming up?

(Testimony of Billy Williams.)

A. All I remember is he said he could top anything Fleetwood paid him.[64]

Q. Do you recall him saying anything about Unions at Kit?

A. He said he could do more than any Union could down there.

* * * * *

Q. Did you go to any meetings of the employees called by Mr. Skinner?

A. Yes, I went to one.

Q. Was the subject of that conversation in that [65] meeting?

Mr. Weston: Could we have the date and place?

Q. Do you recall when it was?

A. I believe it was in March.

Q. Where was it held?

A. It was in the plant in the office up over the time clock, in a little office up there.

Q. I see. And whose office was it, or do you remember?

A. I guess it was Skinner's, I don't know.

Trial Examiner Bennett: Who went to the meeting?

A. All the finish crew.

* * * * *

Q. Do you recall anything said on that occasion about Unions?

A. He said he could do more for anybody in that plant than the Union could do if they would count on him.

* * * * *

Q. (By Mr. Henderson): Do you recall him mentioning [63A] anything about women working for him?

(Testimony of Billy Williams.)

A. He said that if the Union come in that he couldn't afford to pay women Union scale for a man's work.

Q. Do you recall anything else he said on that occasion?

A. He said if the Union come in, that place would be closed and nobody would have a job.

Q. Now during March, did you go to any Union meetings?

A. Yes, I went to all of them.

Q. And there has been some testimony here about a meeting on March 17th. Do you recall whether you saw Mr. Jordon at that meeting?

A. Yes, I did.

Q. I see, and do you recall seeing Mr. Skinner on that occasion?

A. Yes, I did. [64A]

* * * * *

Q. Incidentally, on March 24th or March 31st, do you recall whether or not Mr. Jordon was present?

A. Yes, he was present at all three meetings. [65A]

* * * * *

Q. (By Mr. Weston): He stated that he couldn't afford to pay it or words to that effect.

Trial Examiner Bennett: Did he use words like that; [69] that the company could not afford to pay it? That's the question. A. Yes.

Q. (By Mr. Weston): Well, first he claimed that you were not getting enough work done, is that right?

A. That's right.

Q. I believe that's all I have.

* * * * *

Direct Examination by Mr. Henderson

DONALD W. JESSEN

* * * * *

Q. Did you formerly work for Kit Manufacturing Company? A. Yes, I did.

Q. From when to when was that?

A. I was first employed the latter part of December [70] and the first part of January due to the holiday and I quit there about April the 29th, I believe.

Q. Did you sign up with the Steel Workers Union?

A. Yes.

Q. Did you go to the meetings of the Steel Workers? A. Yes.

Q. About how many did you go to?

A. As many as I could attend due to sickness and other things.

Q. About how many was that?

A. All of them in March, I think I missed two meetings altogether.

Q. I see, and were those meetings all in the Stringbusters Lounge?

A. Yes, except for the one at the Saratoga which I did attend.

Q. Yes, and did you ever observe Mr. Skinner in the bar outside at those meetings? A. Yes.

Q. About how many times?

A. Three or four times.

Q. Did you talk to him on those occasions?

A. Yes, I did.

Q. Did he talk to everybody there?

(Testimony of Donald W. Jessen.)

A. Everyone that he seemed to know he spoke to and [71] bought them a drink.

* * * * *

Q. (By Mr. Henderson): Tell me, did you go to any meetings that Mr. Skinner called where Unions were discussed? Meetings of the employees?

A. Yes, I did.

Q. When was that?

A. That was in March in his office.

* * * * *

Q. How many employees were there?

A. All of the finishing crew.

Q. Was that the same meeting that Mr. Williams testified about? A. Yes, it was.

* * * * *

Q. (By Mr. Henderson): Do you recall what Mr. Skinner said on that occasion about Unions? [72]

A. Regarding Unions he stated the fact, as he put it, that the Kit plant here in Caldwell was under, in no way, supported by the manufacturing company in California, and that if the Union did come in they would be unable to keep the plant open and he would have to close it down and everyone would lose their jobs.

Q. Do you recall anything else he said about Unions?

* * * * *

A. He said that he would take and dismiss the women as . . . that men were able to do more work; heavier work and could combine the jobs and, therefore, that the women would be getting the same amount of pay and doing less work.

(Testimony of Donald W. Jessen.)

Trial Examiner Bennett: Were there any women in the finishing crew? A. Yes, there were.

Trial Examiner Bennett: Among those in the office on that occasion we're speaking of? A. Yes.

Q. (By Mr. Henderson): Now I want to direct your attention to March 17th. Did you go to a Union meeting on [73] that night? A. Yes, I did.

Q. At the Stringbusters Lounge? A. Yes.

Q. Did you see Mr. Skinner that night?

A. Yes, I did.

Q. Did you have a conversation with him that night? A. Yes.

Q. Will you describe what the conversation was . . . excuse me, before I say that, was anyone else present while you were there talking?

A. No sir. I just come from the Union meeting, and I walked out into the bar and he was sitting there and he invited me to sit down and have a drink so I sat down and we started talking and he said, "Don, why do you want a Union?" and I said, "Well, sir, they have give me a greater advantage to negotiating as far as wages are concerned, and it's better working conditions and better for me and I believe sincerely for the plant."

Q. What did he say to that?

A. He said, "If you'll string along with me, I can do more for you than any Union." He said, "I know you're happy making a $1.45 an hour and you wouldn't be making that all the time, but if you string along out here with me and help us, we'll help you" and he said, "You won't be making [74] that $1.45, you'll be beating that."

(Testimony of Donald W. Jessen.)

Q. Do you recall anything else he said about Unions?

Trial Examiner Bennett: That's on March 17th.

Q. Yes, in this same conversation in at the bar on March 17th?

A. Yes, he said that "You may have signed one of those cards, and I don't know, but I have a list of the names back up there. I know you're not happy making $1.45 an hour." He says, "I have a list of names that I haven't gotten to yet," and he said, "It's always nice to know what the opposition has to offer so I won't be wasting my time." He said, "I find out these things so I kinda' know what's going on an kinda' steer these people straight." [75]

* * * * *

Cross-Examination by Mr. Weston

* * * * *

Q. Coming back to this meeting where he had all the finishing crew in the office. I believe you testified that he told you at that time that this plant out here was more or less self supporting?

A. Yes, he did.

* * * * *

Q. Did he explain that to you that that plant out here had to make a go of it or it would have to close?

A. He said that if the Union came in he couldn't pay the wages and the plant would have to be shut down. [77]

* * * * *

Q. Do you believe he was sincere in that statement?

(Testimony of Donald W. Jessen.)

A. I believe anyone is entitled to his opinion.

Q. In other words, he was giving you his views compared to your views on the general subject of Unions? A. Yes. [80]

* * * * *

Direct Examination by Mr. Henderson

LARRY O'BRIEN, JR.

* * * * *

Q. (By Mr. Henderson): And last winter were you employed by the Kit Manufacturing Company?

A. Yes. [81]

* * * * *

Mr. Henderson: It's stipulated betweeen Mr. Weston and myself that Mr. O'Brien was hired November 24, 1958.

Trial Examiner Bennett: He started working there then? A. (By Witness): Yes.

Trial Examiner Bennett: Is that agreeable?

Mr. Weston: Yes, it is.

* * * * *

Q. (By Mr. Henderson): When you went to work there, was there any Union which represented the employees? A. No, there wasn't.

Q. Was there any Unions who were conducting an organizing campaign? A. Yes.

Q. Which Unions were they? [82]

A. The United Steelworkers was the first one.

Q. What other unions were there?

A. And the Carpenters intervened and also the Sheet Metal Workers.

(Testimony of Larry O'Brien, Jr.)

Q. Did you sign a card for any one of these organizations? A. Yes.

Q. Which one of them? A. Steel Workers.

Q. Do you recall about when you did that.

A. No, I don't recall the exact date.

Q. Besides signing a card, did you engage in any activity on behalf of the Steel Workers?

A. Outside the plant, yes, after I was fired.

Q. Let's talk first of all about the time before you were fired. What did you do on behalf of the Steel Workers? A. Passed out cards.

Q. Within the plant? A. Yes. [83]

* * * * *

Q. When you passed out these cards, Mr. O'Brien, what did you do? That question isn't clear. Let me withdraw it. Did you physically hand the cards to the man you were talking to?

A. Most of the time. He knew that I had the cards and he would ask me for the cards.

Q. What would you do?

A. I would give him the card.

Q. What would he do with it then?

A. Sign it and return it to me at night at quitting time. [84]

* * * * *

Q. (By Mr. Henderson): Now Mr. O'Brien, I want to direct your attention to January 22nd. Did you go to a Union meeting that evening?

A. Yes, I did.

Q. Where was the meeting held?

A. In the Saratoga Hotel. [100]

* * * * *

(Testimony of Larry O'Brien, Jr.)

Q. Now, at or after that meeting, did you have a conversation with Mr. Skinner?

A. Yes, we did.

* * * * * *

Q. Where was the conversation?

A. It was in the Saratoga bar.

Q. And will you just tell us what was said?

A. First of all, he asked us how the meeting was going and we told him fine, [101]

* * * * *

Q. I have marked for identification General Counsel's Exhibit No. 4, and I'll show it to you, Mr. O'Brien. Are these the company rules he handed to you?

A. Yes, just a minute I'll find it.

Q. Well, before you find that, I'll find it.

Q. Well, before you find that, I'll offer these rules in evidence.

A. Yes, this is it.

Q. I'll offer these rules in evidence.

Mr. Weston: We have no objection.

Trial Examiner Bennett: They may be received. [106]

* * * * *

Direct Examination By Mr. Henderson

COLLE McKENZIE [119]

* * * * *

Q. Where do you work?

A. Kit manufacturing Company.

* * * * *

(Testimony of Colle McKenzie.)

Q. How long have you been employed there?

A. Since February.

Q. And during June do your recall going to any meetings that were conducted by Mr. Skinner? Meetings of employees where Unions were discussed?

A. Yes, I do.

Q. How many of those meetings were there?

A. There was one in June and there was two before.

Q. Do you recall any Union elections being held in June? A. Yes.

Q. Do you recall what day they were?

A. June the 4th and June the 24th.

Q. Well now, how long before the June 4th election [120] were the first two meetings held?

A. The week before, I believe.

Q. The week before? About how many employees attended those meetings?

A. About a dozen, twelve, I guess.

Q. At each meeting, is that right?

A. Yes.

Q. Where were the meetings held?

A. In Ray's office, in the center of the shop.

Q. And still talking about these, say the first of these meetings, do you recall what Mr. Skinner said there in his office? How did he open the meeting?

A. Oh, about that they didn't need a Union there at the plant, that they felt it was actually too soon for a Union and they would rather wait awhile before Union activities started in the plant at all.

Q. Well, what else did he say if anything?

A. Oh, he told us that we shouldn't go to Union

(Testimony of Colle McKenzie.)

meetings and we should let the plant ride and stick with the plant for at least another year and see how things came out then because things would be better.

Trial Examiner Bennett: Are you still working there by the way? A. Yes, I am.

Q. (By Mr. Henderson): Can you recall anything else [121] he said?

A. Yes, he brought up about the women, that if he had to pay men's wages for women that he would let the women go and hire men in their place.

* * * * *

Q. Well now, can you remember anything else he said?

A. Yes, he told us that before he would pay Union wages; what the Kit plant has on the coast, that he would. . . .us that voted, that he would know who voted and he would let us go.

* * * * *

Q. (By Mr. Henderson): Did he say anything about insurance at this time? A. Which meeting?

Q. This meeting before the June the 4th election.

A. Yes, there was. [122]

Q. What did he say?

A. He said that he had been trying to get insurance for us at the plant here but he said that it would probably be a year but he would work on it and see if he couldn't get it sooner.

* * * * *

Q. The second meeting was that also before the June 4th election? A. Yes.

(Testimony of Colle McKenzie.)

Q. Do you recall what was said at that meeting?

A. It was just about the same.

* * * * *

Q. Now at the meetings around the time of the June 24th election, did you go to one of those?

A. Yes. [123]

* * * * *

Cross-Examination by Mr. Weston

MR. McKENZIE

* * * * *

Q. Now on this insurance, you were present on the 24th meeting, that's the day of the election?

A. Yes.

Q. And do you recall when Mr. Skinner explained to you about the insurance, did he say anything to you about having some cards there to give to you to sign and that they had to be returned to Oakland. . . to San Francisco . . . to Long Beach that next day or two? Did he express the urgency of getting the cards signed immediately?

A. Yes. [127]

* * * * *

Q. So what he was doing on the 24th was fulfilling what he stated about getting you some insurance?

A. Yes.

Q. Did you sign a card yourself?

A. Yes, I did. [128]

* * * * *

Trial Examiner Bennett: You said he referred to

(Testimony of Colle McKenzie.)

the 24th to the insurance plan that he had discussed with you previously, when was the first time that the insurance plan was brought up?

A. The first time I heard about it was the first [128] meeting we held before the June the 4th election.

Q. (By Mr. Weston): Before the first election?

A. Yes, that's right.

Trial Examiner Bennett: How long was that before that elections? A. About a week.

Trial Examiner Bennett: That's the first you heard of the insurance plan?

A. Yes, that's right.

* * * * *

Redirect Examination By Mr. Henderson

MR. McKENZIE

Q. And in discussing the insurance plan at that time, at the first meeting, when did he say it would go into effect?

A. He said it probably would be a year but he would try and get it sooner if it was possible in any way.

Q. He said it would probably be a year?

A. Yes. [129]

* * * * *

Q. He mentioned the Union in connection with insurance at that first meeting?

A. He said that he was trying to get insurance and we were talking about the Union at the meeting, yes.

* * * * *

Direct Examination By Mr. Henderson

DONALD E. McKINNEY

* * * * *

Q. Mr. McKinney, you were employed by Kit Manufacturing Company according to my notes here from March the 9th until July 17th, 1959, is that right?

A. That's right.

Q. I want to direct your attention to the meeting held just shortly before the June 4th elections, did you go to such a meeting? A. Yes, I did.

Q. How did you happen to go to it? [130]

A. Well, I was working in the mill and my lead man, Vern Dobson, came by about 2:50, I guess, in the afternoon of June the 3rd and said they wanted me in the office and I said, "What for?" and he said, "You just go up there and you'll find out," and I was one of the last ones to get in there, and I guess there was nine or ten in there in the room; as many as the room would hold and still sitdown and Mr. Skinner and Bill Brown was up there and Bill Brown later left, and we was there about an hour and a half, I should judge, and Mr. Skinner opened the meeting by saying he guessed we all knew what we were there for, and of course, I knew then.

Trial Examiner Bennett: Just what he said, please.

A. Well, that's just what he said and we all knew what we was there for, and he said the election was coming up and there had been talk about Unions, different Unions, and they promised us pay raises and told us about the California contract and various other inducements to join the unions and he said he could tell us here and now that no outside bargaining agents could

(Testimony of Donald E. McKinney.)

dictate to him or the Kit Manufacturing Company, and what the company would pay or do, and he also said he knew, him and the others, that Kit Manufacturing Company, and what the company would pay or do, and he also said he knew, him and the others, that Kit Manufacturing Company knew what the company could afford and what they could do, and that they wouldn't be dictated to and he said he at one time belonged to a Union but he had [131] to in order to have his job, but that he could assure us that it would be hard to get to get out and we wouldn't want a Union, but the Company had our welfare at heart and . . . that they had our welfare at heart and was trying to do what was best for each employee. He further mentioned that we was just at about the breaking even point now, and this of course was in June and the plant had been in operation that many months, and he was proud of the crew he had; they was doing an efficient job, and it looked like we were going to make more trailers and that meant higher wages, but he said even though he was proud of the crew and we were doing good, that he had started with a new crew in Caldwell last year and that he could start with another new crew. In other words, he said "If you vote Union, you can be dismissed from the company for voting Union." He made that clear several different times throughout the conversation, that if we did vote for the Unions was to vote it out, but if we voted for management we would stay in, and he said that there was talk of this insurance plan but the company couldn't afford to pay for the plan in less than a year; the price of the group plan, at a price that the company could afford, but he said that he would like us to vote non-

(Testimony of Donald E. McKinney.)

Unions, and said "But by all means vote in the election," which was the next day in the afternoon, and I'm trying to think of all the highlights he said. Oh, he said that as [132] production went up, the various departments would get their raises, and I was in the mill there and there was some question raised; one of the fellows at the meeting was from the cabinet shop, about some of the departments being lower paid than the mill, which was one of the high paid departments, and he said it was the amount of turnover in each department, or the longevity of that department; the overall average is what totalled the wages. And he said, all you have to do if you've been there 30 days, you had your wage increased and you was to come to him, which I never did. I asked my foreman and I had got one raise. I believe I got one raise and then later on I did get a raise after the second election and that didn't have nothing to do with this election. [133]

* * * * *

Cross-Examination By Mr. Weston

MR. McKINNEY [135]

* * * * *

Q. Now, I believe you said, among your statements, that he said that if anybody voted for the Union, he would be fired? [136]

A. That's what he told us, yes.

Q. What meeting was this?

A. On June the 4th.

Q. Could you give us the exact date?

A. Pardon me, I believe that was June the 3rd.

Q. June the 3rd? Could you give us the exact words he used to state that? Are you sure that's what he said?

(Testimony of Donald E. McKinney.)

A. Well, one of his exact words was that the company the Kit Manufacturing Company, would not tolerate a Union and if necessary they would dismiss the entire crew if they went Union and start with a new crew. [137]

* * * * *

Mr. Henderson: I propose the stipulation to Mr Weston that the representation petition was filed by the Steel workers on January 19, 1959, and that there were interventions by the Sawmill and Lumber Workers and the Sheet Metal Workers, and the exact dates of those interventions I don't know. The hearing was held February 13th, 1959, and because [138] of the filing of charges in this case, the actual election was held up for awhile, but an election was held on June 4th with those three Unions participating, and the two highest votes were for no Union and the Lumber and Sawmill Workers representative had a run-off election was held on June 24th at which the majority of the votes cast were for no Unions, and objections were filed at the election with the Regional Director with the exceptions in the report with the exceptions directed particularly to the report which are on file in Washington.

Trial Examiner Bennett: Is that agreeable, Mr. Weston?

Mr. Weston: Yes, it is.

Mr. Weller: Mr. Examiner, there is a correction there as to the stipulation. It wasn't the Lumber and Sawmill Workers Blue Mountain District Council of Brotherhood of Carpenters.

* * * * *

(Testimony of Donald E. McKinney.)

Mr. Henderson: Let me make the correction here. It's not the Lumber and Sawmill Workers, it's the Blue Mountain District Council of the United Brotherhood of Carpenters and Joiners of America.

Trial Examiner Bennett: All right. The stipulation is corrected. [139]

Trial Examiner Bennett: On the record. The record may indicate that we have waited from 9:30 until the present moment which is a few minutes after 10:00 for Mr. Henderson's missing witness and apparently it doesn't appear that he's going to show up.

Mr. Henderson: I'm afraid that is true, Mr. Examiner, and I now move to dismiss the complaint as to George Norris. [140]

* * * * *

Trial Examiner Bennett: All right. I'll grant the motion. [141]

* * * * *

Direct Examination By Mr. Weston

RAY SKINNER

Q. Your name is Ray Skinner? A. Yes.

Q. And you live in Caldwell? A. Yes, I do.

Q. You are the superintendent or general manager of the Kit Manufacturing Company?

A. Yes, I am.

Q. How long has that company been in operation in Caldwell, Ray?

A. We started operation of the Kit Manufacturing Company in Caldwell in November 1958.

* * * * *

(Testimony of Ray Skinner.)

Q. And about how many employees do you have out there?

A. Approximately 104 at the present time. [143]

* * * * *

Q. Now, Mr. Skinner, there is some testimony in this case with reference to your having a conversation with a Mr. Jordon, with reference to a position as maintenance man in your plant. Do you recall that conversation or the testimony here in that case?

A. Yes, I do.

Q. You did have such a conversation with him?

A. Yes.

Q. Was he retained and hired as a maintenance man?

A. Yes, he was.

Q. Did he give you at that time any of his qualifi- [144] cations?

A. Yes, he told me he was a qualified electrician and power saw operator.

Q. Did you offer him a wage scale for beginning work? A. Yes.

Q. Did you tell him that would be increased later on if he produced? A. Yes, I did.

Q. Now there is some testimony here with reference to a discussion about the Unions at the time Mr. Jordon was hired by you. Can you tell us what, if any, conversation you had pertaining to the Union at that time?

A. Well, Mr. Weston, I don't remember in general the conversaton, however, I might have expressed my views and concern with the Union for management. [145]

* * * * *

(Testimony of Ray Skinner.)

Q. And there has been some testimony in this record with reference to a meeting in which you told the employees that this was not the time for the Unions. Do you recall telling them that?

A. Yes, I have told them that.

* * * * *

Q. (By Mr. Weston): You heard the testimony here yesterday afternoon the witness Mr. McKenzie? [146]

A. Yes, I did.

Q. Did you hear the testimony also of Mr. McKinney? A. Yes.

Q. Did you hear some testimony yesterday afternoon by one of those witnesses that you made some statements with reference to their voting?

A. Yes.

Q. What was that statement that you told them at that meeting?

A. The statement that I made in concern with their voting, you mean?

Q. Yes.

A. The only statements that I ever made at the meetings directed to any employees of that plant was that I urged all of them to vote but to vote for their choice of management or Union to represent them, but I felt at the time that management could do more for them than the Union organization could at that time.

Q. When you say, "You could do more for them than the Union could", when you made that statement, what did you mean by that?

A. I was referring that a plant such as this. . . .I had certain amount of dollars and cents to put in this

(Testimony of Ray Skinner.)

plant to get it into production and that's all that I had to make this plant a paying proposition in order to keep the em[147]ployees employed at the rate of pay they're making, and it was at the extreme end that I could afford to pay at that time and I might have mentioned that under no Union organization could I afford to pay any more money and couldn't until the plant had a better foundation to stand on, and I asked the employees that I had to give management a chance to make that plant a profitable organization and give us a little more time before they got into something that might be of serious consequences.

Q. Now Mr. Skinner, there has been some testimony here with reference to a meeting held on the 24th of June, the day of the run-off elections. I particularly direct your attention to any statement that you made or anything that you did with reference to the insurance plan which was being adopted by the Company as of that date. Now I would like to ask you if you were in. . . . was it necessary to get the insurance cards signed as of that date?

A. Yes, it was absolutely necessary in order for us to get the insurance into effect as soon as possible. However, this insurance was not an overnight situation. We had been working on a group insurance plan since the beginning of the plant at Caldwell, and from Mr. Arnold Romain, who is secretary of the Kit Manufacturing Company in Long Beach, California, he forwarded the cards up with a teletype message that they be in his hands in Long Beach the following [148] Monday morning; that he had scheduled a hearing with the insurance board that was to underwrite this group

(Testimony of Ray Skinner.)

insurance policy and they had to have the number of employees and dependents on the cards before they could proceed with the underwriting of the group insurance.

* * * * *

Trial Examiner Bennett: You got them the previous day?

A. I got them in the evening. They come in the evening mail after work.

Trial Examiner Bennett: You said that you were working on the insurance plan for some time?

A. Yes.

Trial Examiner Bennett: How long?

A. Since the plant was, well, since the plant was originated. . . . .I mean, the plant here in Caldwell, from November up until the present date, we had been trying to get a group insurance plan for all the employees as we carry in our other plants. [149]

* * * * *

Q. What was his qualifications as a maintenance man?

A. I believe Mr. Jordon was lacking in all phases of the qualifications to be qualified as a maintenance man.

Q. On your statement here involving his discharge or change of status, I believe you state, among other things, that he was insubordinate and wouldn't do what he was told.

A. On various occasions, yes.

Trial Examiner Bennett: What are you referring to now? Are you referring to a document not in evidence?

(Testimony of Ray Skinner.)

Mr. Weston: Yes. Would you give us any incidents of his refusing to do what he was told?

A. One of the most important ones, he was asked to come in on a Saturday, since we had some airliners to re-route in the plant, and this necessitated shutting down the air compressor which had to be done when the plant was not in [150] normal operation and he was called in and he started the job and left before it was completed and consequently resulted in the foreman having to call in other employees to get the job done so that we could go into operation on a Monday morning.

Trial Examiner Bennett: Do you mean that he only worked part of Saturday? A. Yes.

Trial Examiner Bennett: How long?

A. I believe it was in the morning.

Trial Examiner Bennett: A matter of several hours?

A. I believe he worked a full four hours that morning.

Q. (By Mr. Weston): Did he leave without notice or did he get permission to leave?

A. He didn't get permission from me. [151]

* * * * *

Q. (By Mr. Weston): Do you know whether he got permission?

A. He did not get permission from me or the foreman in charge of the job.

* * * * *

Q. Now, do you have any other instances of his inability to work as a maintenance man?

A. Well, in general you observe those occasions [152] throughout and it's kinda' hard for me to de-

(Testimony of Ray Skinner.)

termine on one particular instance, but on one particular instance he was incapable of repairing tools, and he was incapable of doing electrical work just about . . . to my amazement . . . I know I was . . . he was hooking up a machine and he . . . through the circuit breaker on the line, and he was asked by the foreman what he was waiting for and he said, "Well, I shut the breaker off," and he was waiting for the electricity to drain out of the line.

* * * * *

Q. Now when he asked you . . . he asked for an increase to $1.80 an hour, did he?

A. I don't believe he stipulated the amount, I believe he asked for a raise but he might have been referring to $1.80 an hour.

Q. Can you give us some idea in relation to that time when he was laid off?

A. I believe it was two weeks when he was laid off.

* * * * *

Q. What did you tell him when he asked you for the increase in wages?

A. I don't remember what we told him at the present [153] time, but I believe I said, "We'll wait and see."

Q. Had you had any complaints from the foreman or others with reference to his work?

A. Yes, I had various complaints at all times.

Trial Examiner Bennett: Had he been promised a raise? Had he been told that he would get a raise?

A. If he qualified for the job, yes.

Trial Examiner Bennett: When was he told that?

A. When he was hired.

* * * * *

(Testimony of Ray Skinner.)

Q. When did you first decide that he was to be discharged or laid off?

A. Immediately after he was hired, I would say within a week when I discovered that he was not qualified as a maintenance man.

* * * * *

Q. (By Mr. Weston): Now can you tell us why he wasn't discharged before the time that he was actually discharged? [154] A. We don't like to . . . we like to give an employee ample opportunity to prove his ability to do the work that he's supposed to do and we don't take action; don't have action too hastily because there's operations there in the plant that need to be done and it takes some time for an employee to work through the various stages of the job, and I, for one, certainly like to give the employee the benefit of the doubt and not make decisions too hastily as to his ability to do the job.

Q. Did you give him an opportunity to work?

A. I feel that we gave him ample opportunity, yes.

Q. How soon after he was discharged was he replaced with a new employee?

A. I believe it was about two weeks after he didn't come back in, before I transferred a man off the production line to the position as a maintenance man.

Q. Now at the time he was laid off, had he been absent from work just prior to the time he was discharged? A. Yes, he had.

Q. How long had he been away from his job?

A. I believe that he had been absent . . . it was on the third day when he came into the office and talked to me about it, and that would make it three days, if I recall correctly.

(Testimony of Ray Skinner.)

Q. Did he ever have permission from you to take the [155] two days off that he took just prior to his discharge? A. No, he did not.

Q. Was he steady in his work?

A. No, he was not.

Trial Examiner Bennett: What do you mean when you say "He was not steady"?

A. This was not the first time that he had missed work. He had took half-days off and he had, for various . . . I don't remember just how much he did miss, at the present time, but that wasn't the first time that he had been absent from his job.

Q. (By Mr. Weston): Had he been absent before without leave or without permission?

A. He didn't have my permission to be absent, no.

Trial Examiner Bennett: Was he supposed to have your permission?

A. Not necessarily in all cases, no.

Q. (By Mr. Weston): What permission was he supposed to have to take leave?

A. From the plant foreman.

Q. Do you know whether or not he had the permission from the plant foreman to leave his post?

A. No, I don't know whether he did or not.

Q. Now, who was his foreman, his immediate supervisor, or did he work for all of the foremen? [156]

A maintenance man works primarily for all the foremen in the plant, and he has to do what they ask him to do in the course of his work. They operate the equipment and in their station when their equipment breaks down, they call for the maintenance man and then they direct him as to what has to be done. How-

(Testimony of Ray Skinner.)

ever, the plant foreman, which is directly under me in the plant, is Mr. Bill Brown, whom he should have had in connection about his work at all. He should have had them answered by Mr. Brown in case of my absence.

Trial Examiner Bennett: How many foremen were there in the plant at that time in all?

A. I have, at that time . . . there was five foremen, I believe, in the plant.

Trial Examiner Bennett: Including Mr. Brown?

A. Including Mr. Brown, yes. [157]

* * * * *

Q. Now, I'm handing you what has been marked as Respondent's Exhibit No. 1 for identification, and I'll ask you if that's your signature.

A. Yes, it is.

* * * * *

Q. Is this what I have referred to as a change of status form that you prepare at the time that the employee is either . . . has his status changed or is discharged? A. Yes.

Q. Is this writing on here your writing?

A. Yes, it is.

Trial Examiner Bennett: Are you offering it now?

Mr. Weston: I don't know whether it needs to be in evidence at this time or not, but I'll offer it in evidence at this time.

Mr. Henderson: No objections.

Trial Examiner Bennett: I would like to know when you prepared that. Was it on the date it bears or otherwise?

(Testimony of Ray Skinner.)

A. Yes, that would be on the date, I believe. [158]

Trial Examiner Bennett: It bears the date of April the 13th. Is that the date you prepared it?

A. Yes.

Trial Examiner Bennett: I'll receive it in evidence.

* * * * *

Q. (By Mr. Weston): Now Mr. Skinner, I am handing you what has been marked for purposes of identification as Respondent's Exhibit No. 2, is that your signature? A. Yes. [159]

Q. Is that your handwriting? A. Yes.

Q. Was that prepared on the date it bears up there?

A. Yes, it was.

Q. Now referring back again to Exhibit No. 1, you state here that this employee has been terminated for a violation of a rule of the company. Tell us what you mean by that? What rules did you have in mind? Did you have any particular rule in mind?

A. We have rules which normally that all employees fall under once they are terminated. Such as lack of interest in the work, unqualified to perform the duties, being absent from work on consecutive dates, and being late for work, and I believe that was in this case as being absent three days without notice given and unqualified to perform his duties. [160]

* * * * *

Q. (By Mr. Weston): Now in our Exhibit No. 2 . . . I'll offer this in evidence.

Mr. Henderson: No objections.

Trial Examiner Bennett: This purports to be a correction notice, is that correct? A. Yes, it is.

(Testimony of Ray Skinner.)

Trial Examiner Bennett: And in it you make reference to the employee refusing to sign it, is that a fact?

A. Yes.

Trial Examiner Bennett: Who asked him to sign it?

A. I did.

Trial Examiner Bennett: On which date?

A. On the date it was made out.

Trial Examiner Bennett: On the date it was made out, the date that it carries on the top? A. Yes.

Trial Examiner Bennett: All right. I'll receive it in evidence.

Q. (By Mr. Weston): Now in this Exhibit No. 2, you state that this employee was smoking and loitering in the restroom which was near the time clock, and in order to punch his time card fast, and that he has been properly [161] warned of this before and the employee refuses to sign the correction notice with reference to the first statement. How often did this happen?

A. Well, I can't recall how often it happened but it did happen before. We normally give them a chance and we don't write up a correction notice unless it's a repeated violation and I had noticed on several occasions just what dates and how many different occasions it was, but I don't recall, but it certainly wasn't the first one.

Trial Examiner Bennett: You said that he had been warned of this before? A. Yes.

Trial Examiner Bennett: By whom?

A. Me. for one.

Trial Examiner Bennett: How many times did you warn him on previous occasions?

A. I think I only told him about it the one time

(Testimony of Ray Skinner.)

but I had complaints from the foremen that it was repeatedly happening in the afternoon before quitting time.

Trial Examiner Bennett: This particular day, was it March? Was the second time involving you?

A. Yes, the second time involving me.

Q. (By Mr. Weston): What did he say when you asked him to sign that correction notice?

A. He said he didn't want to sign it. [162]

Q. Did he give you any reason?

A. I don't believe so. [163]

* * * * *

Cross-Examination by Mr. Henderson

MR. SKINNER.

* * * * *

Q. And that was during the conversation you had with him at the time of the Union meeting in the Saratoga Hotel? [174]

A. Yes, it was in the lounge of the Saratoga Hotel.

Q. And that was the evening of the Union meeting, was it? A. I believe it was, yes. [175]

* * * * *

Q. (By Mr. Henderson): Now about Mr. Jordon, you have testified that you made up your mind to fire him about a week after you stood him on the payroll, is that right?

A. I believe that's right, a week or two weeks or something like that when I first noticed that he was unqualified for his job.

Q. But you didn't fire him for a couple of months

(Testimony of Ray Skinner.)

after that or for six weeks or so, is that right?

A. That's true.

Q. How many hours a week was he supposed to be working?

A. Normally a work week is forty hours and we consider it his duty, the duty of a maintenance man, to work off hours since that is the only time that he has to ready the plant when something is broken down in order to get it [191] ready to go through the production work week.

Trial Examiner Bennett: You mean work more than 40 hours? A. More than 40 hours, yes.

Trial Examiner Bennett: Was he to be paid for that?

A. Yes.

Q. (By Mr. Henderson): Is there any set any number of hours that he was supposed to work?

A. A minimum number of 40 hours a week, yes.

Q. A minimum of 40 hours a week?

A. Yes.

Q. But you don't instruct them to work any set number of hours like 44 to 48 or 52 hours a week?

* * * * *

Q. Well, now, in Respondent's Exhibit No. 1, the change of status form for Elsworth Jordon, down here a few lines down you have these notations, if I'm reading the writing correctly, "First week, 41 hours; second week, 36.5 hours; third week, 33.6 hours, and the fourth week, 42 hours, should have been 48 hours." Well now, what does that "Should have been 48 hours" mean?

A. That is the date that he took off at lunch and didn't do the job that he come in to do. We asked him to come in and work and help us ready the air line

(Testimony of Ray Skinner.)

in the plant we could go into production with it the following Monday [192] morning, and that's the particular work week that I'm referring to. [193]

* * * * *

Q. Now when did you decide to replace Jordon? When did you make a definite decision on that?

A. Mr. Jordon had been out of the plant his third consecutive day and I had transferred . . . temporarily transferred one of the production electricians over to the job as maintenance man during his absence and I, until the afternoon of the third day that Mr. Jordon had been out, I had had no word from him and he come in with the newspaper clipping in his hand and says, "Does this mean I'm terminated?" and I told him at the time that I had not written any termination notice on him but I was looking for another maintenance man and he said, "Well, that means I'm fired," and I said, "Well, if that's the way you want to put it, that's [194] the way it is. Mr. Jordon stipulated that that was the only way he could take it and I said, "Well, that's up to you, and I told you I have not written a termination notice on you as yet," and I believe the following day he come back and wanted his termination notice and I said, "I haven't written it as yet, Jordon. It's not a company policy to give a termination notice to employees anyway."

Trial Examiner Bennett: Had you decided to terminate him?

A. I hadn't when he came in with the clippings that day. I hadn't made up my mind, but he indicated before that he was qualified at that mill to run a power saw and it could have been in the case of a transfer or

(Testimony of Ray Skinner.)

termination. It would have been up to him to make the choice.

Trial Examiner Bennett: Do you mean termination as a maintenance man or transfer to a power saw job?

A. Yes.

Q. (By Mr. Henderson): You never mentioned a power saw deal to him in your whole conversation, did you?

A. Yes, I told him that I didn't, at the present time, have an opening when he asked to go to work in the plant.

Q. That isn't the conversation I'm talking about. I'm talking about the time which he testified was April 2nd, when he came in with a clipping in his hand and asked if he was terminated. Now in that conversation did you mention the [195] possibility of the power saw? A. No, I did not.

Q. You didn't mention that, the possibility that he would be transferred to a power saw job?

A. No.

Q. Well, why not?

A. Well, I could see no particular reason to since he was not on the job and it appeared to me that he was in perfectly good physical condition to work when he brought the newspaper clipping in and yet he was offering an excuse for not being at the plant on the job.

Trial Examiner Bennett: Is it fair to say when you did place the newspaper advertisement that you had decided as of that time that he was through as a maintenance man?

A. May I point out that I didn't place the newspaper advertisement.

(Testimony of Ray Skinner.)

Trial Examiner Bennett: Who did?

A. The Employment Security Agency here in town. I called them and asked if they had any applications on maintenance men down there or someone that might qualify as a maintenance man and all they tell me is that they'll see what they can do. We do most of our hiring through them.

Trial Examiner Bennett: Is it fair to say then that when you contacted the Employment Agency at that time that you decided to . . . had you needed a replacement as a maintenance [196] man?

A. Yes.

Q. When did you contact them?

A. I- don't remember.

Q. With relation to the day the ad appeared in the paper I mean.

A. Oh, it was probably the day following or something like that.

Trial Examiner Bennett: Had the ad appeared the day following when you called them?

A. I imagine it was. I have no way of knowing. I didn't see it. I didn't read the clipping and see the date of the paper that it come from. In fact, I never knew there was one in the paper until Mr. Jordon brought it in and showed it to me in the plant.

Q. (By Mr. Henderson): Well now, Mr. Skinner, referring again to this statement which you signed, did you not say on page 6, "After he had been absent for three days with no further word from him, I ran an ad through the E.S.A. for a maintenance man." Didn't you say that in this statement?

A. No, I did not run an ad.

(Testimony of Ray Skinner.)

Q. That isn't the question I asked you. I asked if you didn't make that statement here in this piece of paper which you signed.

Trial Examiner Bennett: Let me suggest, Mr. Skinner, [197] that you listen carefully to the questions that he's asking you. Read it to him again.

Q. (By Mr. Henderson): Yes. Now "After he had been absent for three days with no further word from him, I ran an ad through E.S.A. for a maintenance man." Didn't you say that?

A. If it's in the statement, I probably did.

Q. Now you wish to correct that statement?

A. Yes, because I had nothing to do with running the ad in the paper at all, I was only calling for a replacement and that I did do.

Q. You were calling for a replacement?

A. Yes.

Q. You called for a replacement the day before the ad run?

A. I don't remember whether it was the day before or not.

Q. I see.

A. It could have been two or three days before but I don't remember.

Q. Yes. Well, now, referring to General Counsel's Exhibit No. 2 which is the newspaper ad, that states definitely, does it not, that it's taken from the paper of Thursday, April the 2nd. Is that right?

A. Um hum. [198]

Q. So that you certainly called up the E.S.A., which I take is the Employment Security Agency here in Caldwell? A. Right.

(Testimony of Ray Skinner.)

Q. And you certainly called them up as early as April the 1st then, did you not?

A. The date I called I do not remember, but I did call them. [199]

* * * * *

Q. Did Mr. Jordon, to your knowledge, call his supervisor on the first day that he was off with a bad foot?

A. Yes, I believe that his supervisor did tell me that he had called and said his feet were bothering him.

* * * * *

Q. But his supervisor and you had been notified that he would be off work that day, is that right?

A. Yes, I believe that's correct. [200]

* * * * *

Q. Isn't it true that Mr. Jordon had not been off work three days without notice to his supervisor before you contacted the E.S.A. to replace him?

A. Yes, I think that's true. I don't think he had missed three days in any consecutive period. [201]

* * * * *

Q. (By Mr. Henderson): Well as a matter of fact, it was on the very day that he called up that you contacted the E.S.A., wasn't it?

A. I don't believe so. I believe that the first contact that I had with the replacement service, the E.S.A., was when we were refiring the airlines in the plant and he refused to carry out the job even though he started it and he didn't stay there to finish the job and consequently we had to call in more help to get it done, and that's the first one . . . the first time, I believe. that I contacted the E.S.A. for a maintenance man.

(Testimony of Ray Skinner.)

Q. Oh I see, and it was then you decided that you would replace him at that time?

A. I believe it was Monday morning. That occurred [203] on Saturday, I believe it was, and I believe that was the following Monday morning. [204]

* * * * *

Trial Examiner Bennett: Your records indicate the last day that he actually worked for the company there?

A. Yes, it would show on these cards.

Trial Examiner Bennett: Would you find that out for me, please?

(Mr. Weston hands witness correct card.)

A. Yes, it would have been on Tuesday of the week of April the 4th, no the 5th.

Trial Examiner Bennett: It would be Tuesday, March the 31st, is that correct?

A. Yes, I believe that's right.

Trial Examiner Bennett: April the 5th is a Sunday You mean the Tuesday before that then?

A. Our week ends on a Sunday, and that's the pay period ending, which would be the Tuesday preceding that.

Trial Examiner Bennett: Preceding April the 5th?

A. Yes.

Trial Examiner Bennett: That would be March the 31st then? A. Yes. [205]

* * * * *

Q. (My Henderson): No, let me drop that. Why did you fire Jordon? What were the reasons for your firing Jordon?

A. I would like to make this stipulation, if I may.

(Testimony of Ray Skinner.)

I don't refer to firing anyone. I think that the basis that led to Mr. Jordon's termination from the company was, in fact, that it was self-inflicted on himself by, let us say, putting words in my mouth, bringing the newspaper clipping in and saying as far as he went or knew, that meant that he was fired and his disqualification . . . his lack of qualifications for the job that he was doing and also for his absenteeism in the plant.

Q. Now as to whether or not you fire him, didn't you say in this statement, "Elsworth Jordon was terminated by me on or about 4-2-59," did you not make that statement here? A. Yes, I did. [209]

* * * * *

Q. And when he asked for an explanation of the newspaper clipping, what did you reply?

A. I told him, I believe I told him, that I was looking for another maintenance man. [210]

* * * * *

A. No, I did not.

* * * * *

A. No, I was not making a medical judgment of his foot. I called the company doctor and asked for the results of the examination and he said he hadn't been there.

Q. (By Mr. Henderson): Is it a rule of the company that a man cannot have his own doctor?

A. No, it is not, but he must have a doctor's release when he goes to one. [211]

* * * * *

Q. Then you didn't terminate Jordon because he was loitering and smoking in the rest room, did you?

A. No, I didn't.

(Testimony of Ray Skinner.)

Q. Had you ever warned him that he was in danger of being discharged because he wasn't qualified for the job? A. I don't believe that I had.

Q. You never warned him that he might be terminated at all, had you? A. No, I did not.

Q. And you never told him that he wasn't qualified, had you?

A. I think that I mentioned it once to him that he was going to have to learn his job better. [212]

* * * * *

Q. And incidentally, you recall having a conversation with Mr. Jordon the day, the first day he came to work after your meeting with him that night at the Union meeting? [212]

A. The first day that he came to work?

Q. Yes. A. No, I don't.

Q. You don't recall whether you had a meeting with him or not; had a conversation with him?

A. No, I do not.

Q. And then your answer is no?

A. I don't recall having a meeting with him, that's right.

* * * * *

Q. (By Mr. Henderson): Mr. Skinner, on how many occasions were you in the bar of the Stringbusters Lounge when a Union meeting was held?

A. I only remember . . . I didn't know at the time that they were having a Union meeting. These are held in a separate room. I know of one occasion that they had had a Union meeting and I was at the bar.

Q. When was that?

A. I don't remember the date.

(Testimony of Ray Skinner.)

Q. Was it in February? [213]

A. February or March or something like that, I would say somewhere in there.

Q. And you were a member . . . I wanted to call your attention specifically to March 17th, and do you recall being in the bar and having a drink with Don Jessen that night? A. I don't recall that, no.

Q. Do you recall whether or not Elsworth Jordon came up and joined you after you had had a conversation with Jessen for awhile?

A. I don't remember that either.

Q. You wouldn't deny it though?

A. I beg your pardon?

Q. You wouldn't deny it though?

A. If I remembered it, no.

Q. I don't think I make myself clear.

Trial Examiner Bennett: He's asking if you deny it.

Q. (Mr. Henderson): I don't think I made myself clear. Do you actually deny it?

A. No, I don't actually deny it.

Q. You did hold meetings of your employees, didn't you, during February and March in which you discussed Union organization? A. Yes, I did.

Q. And you called them up to your office, didn't you? [214] A. Yes, I did.

Q. And presented management's viewpoint?

A. Yes, I did, right.

Q. And you called the employees into your office shortly before the election on June the 4th and explained what you felt about Unions then, didn't you?

A. Yes, I did.

(Testimony of Ray Skinner.)

Q. And during June the 4th, the day of the run-off election, you called the employees into your office didn't you?

A. Yes, I called the employees into my office.

Q. And you discussed insurance, you say?

A. Yes, I did.

Q. And you presented your views on Unions then, didn't you?

A. I don't believe I got into the Union problem at that time.

Q. Did you present your views on Unions at that time?

A. No, as I had written a letter and given one to each of the employees, there was no reason for it. It was primarily on insurance; however, I'm not denying that I might have mentioned Unions to them, but it was a very brief conversation, if it was touched upon at all at that time.

Q. You don't deny that you touched on the Union conversation though? [215]

A. No, I don't deny it.

* * * * *

Q. And you mentioned the possibility of the plant closing down if the Union came in?

A. I probably did.

Q. And you mentioned also the possibility of women being replaced by men if the Union came in, didn't you?

A. I might have done that, yes.

* * * * *

Q. What did you tell them prior to June 24th about the time the company would put in an insurance plan?

(Testimony of Ray Skinner.)

A. I told them it could be possible that this plant would have to operate for one year before we could get an underwriting company to take insurance on it, on the basis that we wanted to get the same program as we had in our parent [216] factory at Long Beach, California; however, they were told that we had not . . . that we would be continuing to work on the program and they would be notified as soon as we put it into effect.

Q. They were notified on the very day of the Union election, weren't they?

A. They certainly were. [217]

* * * * *

Redirect Examination by Mr. Weston

MR. RAY SKINNER

Q. Now Mr. Skinner, I believe you just testified a few moments ago that in your meeting with the employees in June, that you did mention the Union matter and that the plant might be closed down if the Union came in. What did you mean by that statement?

A. I meant that I had only a certain amount of money to operate on and if I had to pay higher wages I wouldn't be [218] able to do it because I didn't have the money to do it with since the plant was set out on a minimum amount of dollars and I was just at the point where all new employees were being trained on the job and manufacturing expenses were too high, that I couldn't afford to pay any more at that time. [219]

* * * * *

Q. Now I would like to call your attention to Rule No. 7, which provides that "An employee is violating the company rules by being tardy or absent habitually;

(Testimony of Ray Skinner.)

without reasonable cause," and habitually means three times within 30 days without cause. Is that what you referred to when you referred to the fact that the man was off three days? A. Yes.

Q. Plus the fact that he was off two days when he brought the clipping in? A. Right. [220]

* * * * *

Mr. Henderson: I would like to accept that suggestion, if I may. Mr. Skinner, wherein does Elsworth Jordon violate Rule 7? You have it there, don't you?

A. Yes. As far as I'm concerned his entire work at the plant and his continued absence. To me, he had no reasonable cause to be absent. He stated he went to see a doctor and yet he had never brought a doctor's report even though he was asked to do so. [232]

* * * * *

Q. Now this Saturday, March the 21st, when Mr. Jordon worked three hours and apparently went home, did you talk to him that day? A. No, I did not.

Q. Did you ask him to work any more?

A. No, I didn't ask him to work.

Q. Well, who did?

A. I don't know who did. Maybe Mr. Brown who was in charge of the project which he was on did. I don't know, I wasn't there.

Q. You don't know then?

A. No, I don't know who did. He must have been asked to work or he wouldn't have come in.

Trial Examiner Bennett: Is it your testimony that he went home without finishing what he was supposed to do that [236] day?

A. That's correct.

* * * * *

Direct Examination by Mr. Weston

MR. BILL BROWN

* * * * *

Q. Now going back again to Mr. Jordon, there has been some testimony here with reference to his being asked to assist in putting in airlines on Saturday morning. Were you there that morning? A. I was.

Q. Can you tell us what happened with reference to his leaving his employment on that morning?

A. No, I can't tell you that.

Q. Did he give any reason to you for leaving?

A. Not that I remember.

Q. Did you ask him to stay and finish the job? [241]

A. I didn't say no more to him after we got started. I went to lunch.

Q. Did he leave while you were at lunch?

A. Yes.

Q. Who was in charge that morning?

A. I was.

Q. When you came back, he was gone?

A. Yes, it was at lunch or shortly after lunch, I didn't get back right after lunch time as I had some business to take care of.

Q. The job was not finished then?

A. No, I finished it myself.

Trial Examiner Bennett: Did Jordon ever say anything about his leaving or why he left?

A. No.

* * * * *

Cross-Examination by Mr. Henderson

MR. BROWN

Q. Did you ever say anything to Jordon about it?
A. No, I didn't. [242]

* * * * *

Direct Examination By Mr. Henderson

JAMES ALLEN TABOR

* * * * *

Q. Did you used to work for Kit Manufacturing Company? A. I sure did.

Q. Were you working there on March 21st, a Saturday? A. Yes.

Q. How did you happen to be working on Saturday?
A. Bill Brown asked me to come in on Saturday and help put the airlines in. [254]

Q. Who was working with you on the airlines?
A. Elsworth Jordon.

* * * * *

Q. (By Mr. Henderson): I see, and did you finish the job? A. Yes.

Q. And do you recall what time you finished it? [255]

A. I would say an hour before dinner, about 11 o'clock.

Q. And what . . . did you and Jordon talk to anyone after you finished the job?

A. Well, Bill, I asked him, I said, "Do you want me to take off?" and he said, "No. Go ahead and build some tables over in your department and finish up."

Q. Did Jordon talk to Brown? A. Yes.

(Testimony of James Allen Tabor.)

Q. What did Brown tell Jordon?

A. He said he'd ask him, as best as I can recall, he asked him to take off. He said yes that he was through that he could take off.

Q. Who asked who if he could take off?

A. Jordon asked Leo.

Q. Well, what did Bill reply?

A. He said, "Yes, you can take off."

Q. How late did you work that day?

A. I worked until noon that day.

Q. And Jordon took off when he was finished with that job? A. Yes, he did.[256]

* * * * *

Trial Examiner Bennett: When you left at noon Brown was not there though? A. No sir.

* * * * *

Q. (By Mr. Henderson): Did he see the job when you and Jordon finished with it? A. Yes. [257]

Q. I see, and did he say whether he thought it was finished or not? A. Yes.

Q. What did he say?

A. I can't recall exactly what he said, but Jordon asked him to take off, as I said awhile ago, and he said, "Well, it's finished and I believe it's done and you can go."

Q. Do you know whether or not anybody else worked on that job after you and Jordon left?

A. I don't believe so because we didn't have enough air hoses there. We had short air hoses and of course there was nothing we could do. We had it all done, as much as we could do. [258]

(Testimony of James Allen Tabor.)

A. Yes.

Q. So that as of that time there were no more air hoses there to finish the job then?

A. There wasn't no more air hoses there for several weeks later. I worked there.

Q. Did you need more air hoses to finish that job?

A. Huh?

Q. Did you need more air hoses to finish the job? [260]

* * * * * *

Rebuttal by Mr. Henderson

MR. JORDON

* * * * *

Q. I want to direct your attention to Saturday, March 21st. Did you work that day? A. Yes, I did.

* * * * *

Q. Who was working with you?

A. James and Jim and myself. Bill worked on the pipelines that morning.

Trial Examiner Bennett: Who do you mean by James?

A. James Taber.

* * * * *

Q. And how long did you work on it?

A. Oh, I would say, I think we finished up about 10:30 or something like that. [274]

* * * * *

Q. Did you talk to Bill Brown before you went home?

A. Yes, I did, I asked Bill if I could go home and he said yes, but that's all I said.

(Testimony of James Allen Tabor.)

Q. Did Bill Brown ask you to do anything about the [275] tables?

A. No, he did not. That was a maintenance job.

Q. Incidentally, at that time did you have a telephone?

A. I did.

Q. Do you know if Bill Brown knew your telephone number?

A. Yes, they had it on my application.

Q. How far from the plant did you live?

A. Approximately five blocks.

* * * * *

Re-Cross-Examination by Mr. Weston

MR. JORDON

Q. Were you willing to work that day?

A. I was but I was a little sick.

* * * * *

Q. Did you tell Mr. Brown you were sick that day?

A. No, I told him that I would put the airline up and after I got through I was going home and he said "All right, but we have to have that up for Monday morning."

* * * * *

Q. You did tell Brown that you were not feeling well? A. I did.

Q. And you asked if you could go home for that reason?

A. He said, "O.K. The job is finished and you can go home." [276]

* * * * *

Trial Examiner Bennett: You said you finished every-

(Testimony of Elsworth Franklin Jordon.)

thing you had to do that morning when you asked for permission to leave? A. Yes, I had. [280]

* * * * *

Q. So you casually walked up to the foreman and said, "I don't feel good, I've finished my job. Is it o.k. for me to go home?" and he said, "Yes."

A. I walked up to the foreman and I said, "Bill I don't feel good, that I finished my job and I wanted to go home," and he said, "Yes Jordon, we don't have nothing else for you to do." That these guys was going to finish building the tables and then they were going to go home. As a matter [282] of fact, that morning they said they were not going to work but a half a day.

* * * * *

A. Yes. I asked Mr. Brown where the maintenance man was, and the men that were working on the airlines, and he said, "I don't know. They haven't come back from lunch yet."

Q. Was the job completed?

A. No, it wasn't.

Q. Were you disturbed about it?

A. Yes, I was. I called Mr. Brown in my office and I told him that when I borught a crew in and paid them time and a half on a weekend, that I expected to get the job done and that was when it was so important that I had to pay for time and a half work; that it was important that that job be finished [285] so that the plant would have to have the airlines in working order on Monday morning's production.

Q. Was there still some work to be done on the job by the maintenance man?

A. Yes, quite a lot of work to be done.

(Testimony of Elsworth Franklin Jordon.)

Q. Would you explain what that was, please?

A. Yes. When the line was taken . . . I believe the previous testimony has been given that the line was on the floor which is correct, and it was to be removed from the floor and installed overhead in the plant.

* * * * *

Q. (By Mr. Weston): These fittings on the line and the extensions of the overhead line, whose job would that be? [286]

A. That would be the maintenance man's job.

Q. That was not completed when you came out there Saturday morning then? A. No, it was not.

Q. Now with reference to the building of the tables, whose job was that?

A. That is the maintenance man's job along with other help. We don't expect the maintenance man to do all the construction himself; he couldn't do it, couldn't do all of it himself but it's definitely his responsibility to help build them.

Q. So that when you went out there on that Saturday afternoon you found the job was not completed?

A. That is correct.

Q. And there was still considerable more work for Jordon to do then? A. Yes. [287]

* * * * *

Recross-Examination by Mr. Henderson

MR. SKINNER

Q. Mr. Skinner, what did you say to Mr. Jordon the next Monday when you saw him about this job, if anything?

A. I don't recall talking to him at all about it.

(Testimony of Ray Skinner.)

Q. You didn't say anything to him at all, did you?

A. I don't believe so. I don't just remember discussing that directly with the employee.

Q. I see, and did you instruct Mr. Brown to say anything to Mr. Jordon about that?

A. I don't know whether I told Mr. Brown to say anything to him or not, but I asked Mr. Brown that afternoon why Jordon went home when the job was not finished.

Q. But you didn't instruct Mr. Brown to say anything to Mr. Jordon?

A. I don't recall making any statement to that effect, no.

Q. I see, and so far as you know, nobody ever talked to Jordon about it? A. It could well be. [288]

* * * * *

Q. (By Mr. Henderson): What time did you talk to Mr. Brown about this?

A. Immediately after lunch on that Saturday.

Q. What time was that?

A. Probably between, oh, around 12:30. [290]

* * * * *

Q. My question was what did Brown do, I didn't say what did he tell you?

A. Mr. Brown started breaking out the airlines and putting in the correct fittings and hooking it back up.

Q. How long did that take?

A. Most all the afternoon.

* * * * *

Redirect Examination by Mr. Weston

MR. BROWN [291]

* * * * *

Q. And Mr. Brown, there has been some testimony since you were here, by Mr. Jordon and Mr. Taber, to the effect that . . . I believe the testimony of Mr. Taber was that on the Saturday morning no connections were available, where you were putting the airlines overhead. Mr. Jordon came to you along about 10:30 or 11:00 and said that he wasn't feeling well and that his job was finished and he would like to go home. Did he do that or didn't he? A. He did not.

* * * * *

Q. So that when Mr. Jordon . . . did Mr. Jordon leave without your consent? A. Yes, he did.

Q. Now there has been some testimony here by Mr. Jordon, particularly that his job was completed on that Saturday. Was that or was that not a fact?

A. That is incorrect. The job was not completed

Q. And there has also been some evidence here by Mr. [292] Jordon that he had nothing to do with building the tables. Is that correct?

A. Building what tables?

Q. Weren't you building some tables?

A. You mean for the sheet metal shop?

A. Yes.

A. Yes, we were building tables for that.

Q. Would that be part of his work then?

A. Any type of plant maintenance is plant maintenance man's work.

* * * * *

(Testimony of Bill Brown.)

Q. Now when you came back after lunch, did Mr. Skinner talk to you about this job?

A. Yes, he did.

Q. What did he have to say to you?

A. He asked me if I was done and where was Mr. Jordon.

Q. What did you tell Mr. Skinner?

A. I don't remember what I told Mr. Skinner.

Q. Did you and Mr. Skinner then finished the job? [293]

A. Yes, completed it.

Q. How long did it take you about?

A. I really don't remember. It was the better part of the afternoon.

* * * * *

Recross-Examination by Mr. Henderson

MR. BROWN

Q. Well, Taber was working with Jordon on that job, wasn't he? A. He was. That's right. [294]

* * * * *

Q. And you didn't say anything about the tables, did you? A. No, I didn't.

* * * * *

Trial Examiner Bennett: Do you know what Taber was sup- [295] posed to do there that day?

A. Taber was helping with airlines and building tables.

* * * * *

Q. What did he start doing that morning?

A. Started on the airlines.

(Testimony of Bill Brown.)

Trial Examiner Bennett: Did you discuss this with Jordon or Taber before the following Monday or thereafter?

A. I don't recall whether I did or not. [296]

* * * * *

Mr. Weston: Just one more question. Was it Mr. Jordon's job to make those up for you?

A. Yes, it was.

Mr. Weston: Did you have to make them up Saturday afternoon?

A. We made up some but we didn't make them all up. [300]

* * * * *

[Endorsed]: Filed September 26, 1960.

GENERAL COUNSEL'S EXHIBIT 2

Caldwell, Idaho, Thursday, April 2, 1959

13.—Male or Female
Help Wanted

Placement
Service

Sheet Metal Workers

Immediate local openings available for men 20 to 40 years of age with previous sheet metal experience. Aircraft sheet metal assembly preferred. Starting wage $1.30 per hour.

Maintenance Man

Will do installation, hook-up, maintenance, and repair of various electrical tools. Must have previous electrical maintenance experiment. Permanent job. Starting salary $1.50 per hour.

Employment Security Agency
815 Cleveland
Caldwell

17.—Situations Wanted

Plant Rules and Regulations

KIT MANUFACTURING CO., INC.

Airport Ave. and Warehouse Rd.

Caldwell, Idaho

There's no getting away from them . . .

RULES — that's what we're talking about! From the cradle on up, there are always rules. And, between us, we're lucky to have them. Call them rules, or laws, or whatever you like, they keep us from getting our fingers burned. They protect us. They show us the safest, most considerate, and best way to act at all times and places.

As members of society, we all have a hand in creating rules and making them stick. We, as individuals, protect our own rights by respecting those of others. At Kit, as elsewhere, the purpose of rules is to offer a pattern or guide. It is a lot easier to get along if we know what NOT to do.

To make sure that you and every employee gets a fair deal, we have the same rules for everyone. We don't want to take away your liberty or tie your hands in any way. We just want you to remember that in an organization as big as ours, we've got to act together for the good of every-

one. Some rules apply to safety; others apply to how you do your job, to conservation, to plain good sportsmanship. We want Kit always to be a safe place to work — a place where you'll have the most pleasant working conditions.

That's why we've given you this booklet of rules and regulations. In a short time, you can read them all and know the score. We bet you'll find that these rules make sense — good common sense.

There are penalties for all listed violations, naturally. They vary according to how serious the rule violation is and how many violations there have been. Penalties range from a Warning Notice to Discharge. Discharge results in cases of serious violations or in other instances where an employee fails to correct his action after previous warnings. Supervision enforces the rules.

As an important part of your work at Kit, we expect you to read the rules carefully and to be guided by them. It pays to stay within the rules. By doing this, you make your work and that of your fellow employees safer, easier, and more pleasant. We ask you to avoid the Rule Violations that follow. That's because we're pulling for you to make good at Kit.

PLANT RULES AND VIOLATIONS

1. Starting time is 7:30 A.M. Quitting time is 4:15 P.M. Lunch hour is from 11:30 A.M. to 12:15 P.M. Each employee is expected to be ready for work when the starting whistle blows and is expected to be at work station when quitting whistle blows.

2. Conformance to all factory notices and signs is a must.

3. Misuse of company time; such as, washing up, loitering near exits, or lining up at doors prior to quitting time or before lunch periods, make you an undesirable employee; so does the reading of papers in toilet rooms, or elsewhere, during working hours.

4. Tools are part of your job. As a competent workman, you are expected to supply yourself with necessary hand tools. Special tools are supplied by the Company. Proper handling and care of all tools and equipment are measures of your competence as an employee.

5. Falsifying Personnel records or Company records.

6. Knowingly punching the time card of another employee, having one's time card punched by another employee, or unauthorized altering of a time card.

7. Being tardy or absent habitually without reasonable cause. (Habitual—3 times in a 30-day period.)

8. Habitually failing to punch time card (3 times in any 30-day period—habitual.)

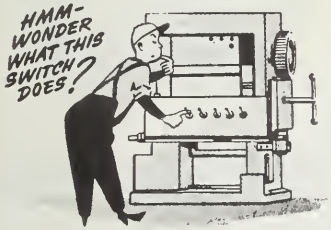
9. Possessing weapons, explosives or cameras on Company premises without written authorization.

10. Insubordination.

PLANT RULES AND VIOLATIONS

11. Being absent for a period of 3 consecutive working days without notifying your Supervisor.

12. Creating, or contributing to, unsanitary or poor housekeeping conditions.



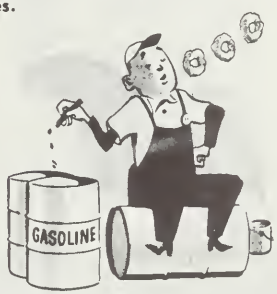
13. Operating, using or possessing machines, tools or equipment to which the employee has not been specifically assigned.

14. Engaging in horseplay, scuffling, throwing things, or causing confusion by shouting or demonstrations.

15. Making scrap due to carelessness.

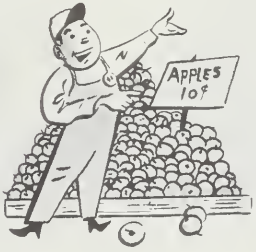
16. Wasting time, loitering, or leaving place of work during working hours without permission.

17. Smoking except in specifically designated areas and during specified times.



18. Threatening, intimidating, coercing or interfering with fellow employees on the premises.

19. Vending, soliciting, or collecting contributions for any purpose whatsoever on Company time on the premises, unless authorized by Management.



PLANT RULES AND VIOLATIONS

20. Distributing written or printed matter of any description on Company premises unless approved by Management.

21. Posting or removal of any matter on bulletin boards or Company property at any time unless specifically authorized by Management.

22. Removing from the premises without proper authorization, any Company property or that of another employee.

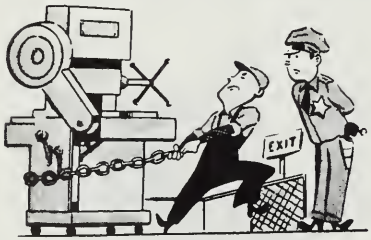
23. Gambling, or engaging in a lottery on Company premises.

24. Wilfully or negligently misusing, destroying, or damaging any Company property or property of any employee.

25. Deliberately restricting output.

26. Making of false, vicious, profane, or malicious statements concerning any employee, the Company or its product.

27. Fighting during working hours or on Company premises.



PLANT RULES AND VIOLATIONS

28. Drinking or possessing any alcoholic beverage on Company premises or on Company time.

29. Reporting for work while under the influence of alcohol or drugs.

30. Engaging in sabotage or espionage.

31. Violating a safety rule or safety practice.

32. Assignment of wages (with exception of Union dues check-off) or garnishments.

33. Immoral conduct or indecency.

34. Taking more than specified time for meals or for rest periods.

35. Productivity or workmanship not up to standard.

36. Failure to work special hours, or special shifts, when required to do so.

37. Using vending machine (candy, cigarettes, etc.) during working hours.

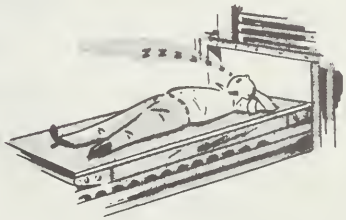
38. Leaving plant during work shift without permission.

39. Running in the plant.

40. Leaving assigned work area without proper authorization.

41. Interfering with plant discipline or efficiency.

42. Entering restricted areas without specific permission.



43. Sleeping on job during working hours.

OBSERVE
ALL
SAFETY
RULES!

RESPONDENT'S EXHIBIT 1.

Kit Manufacturing Co., Inc.

9-16-59 4-13-59

R-1 E.E.B

Change of Status

Elsworth Jordan Termination

This employee has been terminated for violation of the rules of the Company, and irregular attendance on the job.

Since being with this company as a trainee from 3-1-59 to 4-13-59 he has missed several days work and has refused to work when told to do so. 1st week 41 hrs. second week 36.5 hrs. 3rd week 37.3 hrs. 4th week 42 hrs. should have been 48 hrs. 5th week 16 hrs. This employee refused to co-op, in work. I terminated him for being off job 3 days straight with notice and not being qualified for job

/s/ R. SKINNER,
Supervisor

Reason For Termination

Involuntary	Voluntary
Lack of Work √	Sickness in family
Reorganization	Leaving the area
Violation of rules √	Return to school
Insubordination	Dislike of task
Irregular attendance √	Unsatisfactory work conditions
Dishonesty	Business for self
Not suited to the position √	Health
Disorderly conduct	Wage

RESPONDENT'S EXHIBIT 2.

Kit Manufacturing Co., Inc.

Correction Notice

Change of Status

9-16-59 3-30-59

R-2 E.E.B

Elsworth Jordon

Smoking and loitering in rest room which is near time clock, in order to punch his time card first. He has been properly warned of this before.

Employee refuses to sign correction notice.

/s/ R. SKINNER,
Supervisor.

Reason for Termination

Involuntary

Lack of work
Reorganization
Violation of rules
Insubordination
Irregular attendance
Dishonesty
Not suited to the position
Disorderly conduct

Voluntary

Sickness in family
Leaving the area
Return to school
Dislike of task
Unsatisfactory work conditions
Business for self
Health
Wage

[Endorsed]: No. 17057. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Kit Manufacturing Company, Appellee. Transcript of Record. Petition for Enforcement of an Order of the National Relations Board.

Filed: September 30, 1960.

/s/ FRANK H. SCHMID,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KIT MANUFACTURING COMPANY,
Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 *et seq.,* as amended by 73 Stat. 519) hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondent, Kit Manufacturing Company, Caldwell, Idaho, its officers, agents, successors, and assigns. The proceeding resulting in said Order is known upon the records of the Board as Case Nos. 19-CA-1742, 1766 and 1815.

In support of this petition the Board respectfully shows:

(1) Respondent is a California corporation engaged in business in the State of Idaho, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on April 27, 1960, duly stated

its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank by registered mail, to Respondent's Counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceeding set forth in the transcript and upon the Order made thereupon a decree enforcing those sections of the Board's said Order which relate specifically to the Respondent herein, and requiring Respondent, its officers, agents, successors, and assigns to comply therewith.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C., this 17th day of August, 1960.

[Endorsed]: Filed Aug. 22, 1960. Frank H. Schmid, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes Now The Kit Manufacturing Company, a corporation, and for its Answer to the Petition for Enforcement of an Order of the National Labor Relations Board, denies each and every allegation contained therein except as hereinafter admitted, qualified or explained:

(1) Admits that the Respondent is a California corporation engaged in business in the State of Idaho within the judicial circuit of this Court and that the acts with which the Respondent was charged are alleged to have occurred within this judicial circuit. The Respondent admits the jurisdiction of this Court.

(2) Respondent admits service upon it of the Board's Order, its Findings of Fact and Conclusions of Law on the 27th day of April, 1960.

(3) The Respondent alleges that the said Board's Findings of Fact and Conclusions of Law and Decision and Order were not in accordance with the requirements of law and the fact and were not supported by substantial evidence or the record as a whole and do not comply with the requirements and due process.

(4) That the General Counsel has failed to sustain the burden of proving by a preponderance of the evidence that the employee in question was discharged for union activities and not for cause and that the Decision

is based upon inferences and not upon evidence contained in the record.

(5) The Respondent prays reference to the record of the proceedings before the said Board and the evidence, pleadings, Findings of Fact, Conclusions of Law and Decision and Order of the Board and the Trial Examiner and all other proceedings had in this matter.

Wherefore, The Respondent prays that the Court review the said Order and enter a decree denying the Board's Petition for Enforcement and set aside the Board's Order in the subject proceedings.

Dated: September 6, 1960.

Respectfully submitted,

/s/ ELI A. WESTON,
Attorney for Respondent,
Kit Manufacturing Company.

Duly verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Sept. 8, 1960. Frank H. Schmid, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, petitioner herein, in accordance with the rules of this Court hereby state the following as the points on which it intends to rely:

1. Substantial evidence on the whole record supports the Board's finding that respondent Company violated Section 8 (a) (1) of the Act by threatening employees with economic reprisals if they engaged in union activities, unionized, or voted in favor of a union in representational elections and by promising and instituting economic benefits for refraining from engaging in union activities, for rejecting unions or for not supporting them.

2. Substantial evidence on the record as a whole supports the Board's finding that respondent Company violated Section 8 (a) (3) and (1) of the Act by discharging Employee Elsworth Jordon because of his union activities.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C., this 23rd day of September, 1960.

[Endorsed]: Filed Sept. 26, 1960. Frank H. Schmid, Clerk.

Nos. 17,058 — 17,059

IN THE

United States
Court of Appeals
For the Ninth Circuit

FOOD MACHINERY & CHEMICAL CORPORATION, a Corporation, operated as WESTVACO MINERAL PRODUCTS DIVISION, and J. R. SIMPLOT COMPANY, a corporation,

Appellants,

vs.

W. S. MEADER and MAY MEADER, husband and wife,

Appellees.

Appeals from the United States District Court for the District of Idaho, Eastern Division

BRIEF OF APPELLANTS

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LLOYD E. HAIGHT
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Boise, Idaho
Attorneys for Appellant,
J. R. Simplot Company

IN THE

United States
Court of Appeals
For the Ninth Circuit

FOOD MACHINERY & CHEMICAL CORPORATION, a Corporation, operated as WESTVACO MINERAL PRODUCTS DIVISION, and J. R. SIMPLOT COMPANY, a corporation,

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Appellees.

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BRIEF OF APPELLANTS

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Attorneys for Appellant,
J. R. Simplot Company

SUBJECT INDEX

TABLE OF AUTHORITIES CITED
CASES

STATUTES AND REGULATIONS

TEXTS

IN THE

United States
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For the Ninth Circuit

FOOD MACHINERY & CHEMICAL CORPORATION, a Corporation, operated as WESTVACO MINERAL PRODUCTS DIVISION, and J. R. SIMPLOT COMPANY, a corporation,

Appellants,

vs.

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Appellees.

Nos. 17,058
17,059

Appeals from the United States District Court for the District of Idaho, Eastern Division

---

BRIEF OF APPELLANTS

I
SUMMARY STATEMENT OF THE CASE, JURISDICTION, PLEADINGS AND PROCEEDINGS

On January 31, 1957, W. S. Meader and May Meader, husband and wife, the Appellees, then plaintiffs, filed a complaint in the United States District Court for the District of Idaho, Eastern Division, against Food Machinery & Chemical Corporation,

operated as Westvaco Mineral Products Division, a corporation, and J. R. Simplot Company, a corporation, Appellants, then defendants, to recover damages for loss to their trout hatchery, trout eggs and property, allegedly resulting by reason of the operation by Appellants of their industrial plants near Pocatello, Idaho. The complaints were based upon the theory of nuisance. (R. 3-9, Vol. I, No. 17058; R. 3-9, Vol. I, No. 17059)

The separate complaints alleged Appellees were citizens of the State of Idaho; that Food Machinery & Chemical Corporation was a Delaware corporation qualified to do business in the State of Idaho; that J. R. Simplot Company was a Nevada corporation qualified to do business in the State of Idaho; and in each complaint that the matter in controversy, exclusive of interest and costs, exceeded the sum of $3,000.00

An answer was filed by Appellant Food Machinery & Chemical Corporation (R. 12-14) and an amended answer (R. 15-18m, Vol. I, No. 17058) and an answer by J. R. Simplot Company was filed. (R. 15-19, Vol. I, No. 17059)

The District Court had jurisdiction, pursuant to Section 1332, Chapter 28, U.S.C.A. The cases were consolidated for trial, and they were tried before a jury and judgment entered against the defendants April 23, 1959. (R. 71-72)

Appellants filed notice of appeal. (R. 88, Vol. I, No. 17058; R. 66, Vol. I, No. 17059) Supersedeas

bonds were filed and approved by the District Judge. (R. 88-90, Vol. I, No. 17058; R. 67-69, Vol. I, No. 17059)

This Court has jurisdiction of these appeals pursuant to Title 28, Sections 1291 and 1294, U.S.C.A., and under Rule 73, Federal Rules of Civil Procedure. Pursuant to Stipulation entered into between counsel and the Order of the Chief Judge, United States Circuit Court of Appeals, Ninth Circuit, the several appeals were consolidated, with a single record required, and the Appellants permitted to file a consolidated brief on appeal. (R. 77-78, Vol. I, No. 17059)

II
STATEMENT OF FACTS

Appellees sought relief upon the theory of a private nuisance damaging to their property. The allegations of their complaints can for all practical purposes be considered as identical, it being alleged that Appellant Food Machinery & Chemical Corporation operated its manufacturing plant in the production of phosphorus and that Simplot operated its in the production of acids and fertilizers.

Appellees allege that gases and particulates from Appellants' plants were deposited upon their real estate and upon the ponds of water on the same, which waters and springs were used in the operation of a commercial fish hatchery business. That the commercial trout hatchery business was impaired

and damaged, and the natural vegetation on the premises was damaged, injuring and killing their fish and reducing the quantity and quality of trout eggs produced by the breeding stock of trout owned by the Meaders.

Appellants' answers in general raised the same defenses, denying any damage or injury of any kind to the Appellees' fish or property, and alleged Appellants were and are operating lawful businesses in a lawful manner.

Appellees alleged a wilful and knowing disregard of their rights by each of the defendants and prayed for $50,000.00 punitive damages and $200,000.00 general damages against each. The Court on its own motion refused to receive evidence on the question of punitive damage. (R. 857)

Appellees established that their trout hatchery had been operating for several years prior to the installation of the plants of Food Machinery & Chemical Corporation in the latter part of the year 1949 and the installation of Simplot's plant in about the year 1944; that they had, generally speaking, been operating their hatchery and trout farm as an egg taking station which was their principal business during the times alleged in their complaint and shortly prior thereto.

Appellees established by their income reports that their profits for the operation of their business were considerably less for the years 1953, 1954 and 1956 than those for the seven years prior to the year 1953,

but that their profits in the year 1955 were much greater than for any of the years from 1946 to 1956, inclusive.

The testimony of Appellees and their lay witnesses established greater fish loss in the years 1953, 1954, 1955 and 1956, than in other years; that they lost more trout eggs and were unable to fill their trout egg orders as formerly; that they had extraordinary losses of trout and trout eggs.

Appellees showed that smoke and dust at times from Appellents' plants settled and hung over the waters at the Meader Hatchery; that this had not happened before; that the Meaders could not account for their loss; that they noticed a greater loss of trout and trout eggs after rains, winds and when the smoke from the two plants hung over the waters, at which times the loss of trout was then extremely heavy; that it was extremely heavy in 1955 and 1956; that the hatchery lost its value as an egg taking plant and that this situation existed on the date of the sale of the hatchery for $200,000.00 in 1956. Their income reports show the following profits and losses for the years 1946 to 1956, inclusive: (R. 454, Appellees' Exhibit 15)

1946	$ 9,692.96 profit
1947	13,513.54 profit
1948	27,707.88 profit
1949	19,718.22 profit
1950	19,011.18 profit
1951	21,474.94 profit

1952	12,144.19 profit
1953	1,492.90 loss
1954	954.13 profit
1955	48,607.45 profit
1956	2,384.18 profit to June

Appellees' expert testified that a constant level of 4.5 to 20 ppm soluble fluoride would likely result in the damage to trout and trout eggs; that out of 12 samplings taken by Food Machinery & Chemical Corporation in the year 1953, only one showed a content of 4.7 ppm, with an average of .5 ppm for the 12 samplings; that a total of 48 samples were taken in 1953, with only the one showing 4.7 ppm; that with respect to the 4.7 ppm sample there is no proof of the date of the sampling, and there is no other supporting proof as to the length of time the water remained in such condition, and no proof as to whether or not it was before or after the spawning season; that there was one sampling of vegetation in 1951 on the Malcolm Martin farm adjacent to the Meader Fish Hatchery showing a content of 300 ppm, and one sampling of leaves in 1954 at the Meader Hatchery showing content of 137 ppm; that the discharge in pounds per day by Appellants of effluent in the way of fluoride was as follows:

Food Machinery & Chemical Corporation		J. R. Simplot Company	
1949	1700	1949	Unknown
1950	1700	1950	Unknown
1951	3300	1951	Unknown

1952	3300	1952	Unknown
1953	6500	1953	484
1954	3100	1954	110
1955	600	1955	190
1956	600	1956	190
1957	600	1957	125
1958	600	1958	100

Meaders' hatchery is approximately two miles northerly from Appellants' plants. Appellees' Exhibits 25, 26 and 27, reports of the University of Idaho for the years 1955, 1956 and 1957, show and prove conclusively from a complete water survey of the area, including the Meader Hatchery, that the waters in the area showed a low fluoride content, with no contamination; that a comparison of the samples analyzed by the University of Idaho in their surveys with those taken previously by Dr. Greenwood (Exhibit 17) and Dr. Wohlers show no material change in the fluoride content of the water prior to and following the year 1955.

Appellees' Exhibits 1 to 9; 25, 26 and 27 show a difference in the parts per million of fluoride on vegetation in the area before and after the year 1955, but none insofar as running water or any water in the area was concerned.

The record discloses, and the evidence is uncontradicted, that neither the fish, nor the fish eggs suffered from fluorosis; that they did not evidence any signs of damage from fluoride. The uncontradicted testimony is that when Warren Meader no-

ticed a heavy loss of fish he telephoned Dr. Henry C. Wohlers, a senior chemist in the employ of Stanford Research Institute, Menlo Park, California, which Institute was a non-profit research organization investigating the fluoride situation in the Pocatello area at the request of Food Machinery & Chemical Corporation (R. 993-994); that Wohlers took some of the fish and the leaves from the willow trees, analyzed both, gave the results to Meader; that the analyses of whole fish did not show a fluorine content that was in any way damaging to trout; that leaves falling from the trees, if all in that particular area had fallen into the moving water, could not have added any appreciable amount of fluoride to the water. (R. 1008-14)

It is undisputed that fluorapatite, the substance emanating from Appellants' plants, if poured into the water in tons would not increase the fluorine content in any appreciable amount due to its insolubility; that any gaseous fluoride permeating the leaves on the trees at Meader Fish Farm could not have possibly affected the waters.

One of the exhibits recovered from the Meaders and produced by them, but introduced by Appellants, showed an average fluoride vegetation concentration on the Meader Fish Farm of not exceeding some 40 ppm, and one sample as low as 7 ppm.

Ninety-six samplings of Meader Hatchery water, including those made by the University of Idaho, those by Dr. Greenwood for Meaders and those made

by Stanford Research, Food Machinery & Chemical Corporation and Simplot Company, showed an average of less than 1 ppm of fluoride for the years covered by Meaders' complaint.

A water sampling taken from the mine from which defendants received their phosphate shale, where the fluoride content is as high as 33,000 ppm showed a fluoride content of less than 1 or 2 ppm. (Appellants' Exhibits 30-31, R. 946, 985)

The testimony of Dr. Wohlers and Dr. Wood is absolutely uncontradicted that the fish and the fish eggs were not affected by or damaged by fluorine or fluoride. (R. 1009, 1067-71)

The uncontradicted testimony and proof of both Appellees and Appellants is that fish die from many different causes; that they are called "shorttails"; that they are called "cripples," and that there are a great many losses of fish in every hatchery. The witness, Nelson, a son-in-law of the Meaders, estimates the total normal loss from the time eggs are placed in the hatchery until the fish are reasonably mature to be 40% to 60%. The symptoms of the fish that died prior to the erection of the defendants' plants were the same as those that died after. (R. 781-782, 784)

Counsel for Meaders, at a preliminary hearing advised the Court:

> "A slight change in the temperature of the water can cause a heavy loss of fish." (R. 123)

All the defense testimony is consistent with the

direct testimony of the Meaders and there is no conflict as to the cause of the loss of fish by death or of fish eggs not properly hatching.

The Appellees secured the services of Dr. Greenwood, a recognized expert; they secured the services of Dr. Ziegler, Dr. Gate, Dr. Weise and Dr. E. O. Leonard, none of whom were asked for an opinion as to what caused the loss of plaintiffs' fish or fish eggs.

Dr. Wohlers testified, positively, that the amounts of fluoride discharged by the plants of the Appellants had no bearing on the question of damage to trout because the content of fluoride in the water at the Meader Hatchery was known; he further testified positively that inversion as discussed by the Appellees, and which had to do with atmospheric conditions, considering the effluent from the plants, would not affect the fluorine content of Meaders' waters. (R. 1045)

All of the waters, soil, vegetation and air in the vicinity of the Hatchery and the industrial plants contains normally certain amounts of fluoride: The waters from .3 to 1.1 ppm; the soil, 500 ppm; and the vegetation 5 to 20 ppm. (R. 966) The amount of fluoride in the air is constant in minute quantity at all times.

No tolerance by trout to fluoride has been scientifically established, and no standard was suggested by Meaders except the testimony of Dr. Gale as to the effect upon the cells of trout when directly and

constantly exposed to fluoride by ingestion. Dr. Gale specifically stated that his estimate did not apply to flowing water or to any water at all. (R. 286 and 310)The record and testimony of this witness is specifically set forth and identified in the argument.

It is undisputed that the trout eggs in the hatchery troughs were supplied with water from a spring flowing directly out of soil that contained naturally 500 ppm fluorine; that this water as it went into the hatchery troughs where the eggs were taken care of was mixed with water taken from one of the ponds that contained fish and in which fish were fed and that the troughs received water in the amount of 50% from the spring that was piped directly to the hatchery building and 50% from water piped into the hatchery building from the pond containing trout. (R. 767)

It was definitely established by the Meaders' evidence that eggs brought to the hatchery from other localities and from other hatcheries did not produce any better than the eggs taken by Meaders from their own spawners. (R. 591)

Meaders secured the services of Drs. Greenwood and Ziegler of the University of Utah in analyzing and studying their problem. Dr. Greenwood is a recognized authority in the fluoride field. These experts visited the Meader property, made analyses of trout and of the water at the fish hatchery and Dr. Leonard analyzed the water.

Food Machinery & Chemical Corporation employ-

ed the services of Stanford Research Institute in studying the problem at the Meader Hatchery and cooperated with the Meaders in every respect in trying to ascertain the cause of the trouble at the hatchery, but were finally told their services were not wanted. (R. 642-649, 659, 1006)

The wind direction, as shown by the weather reports, was from 10% to 12% of the time in the direction of the Meader property from the Food Machinery & Chemical Corporation plant and about 5% of the time from the Simplot Company plant. It is plain that no fluoride from the plants could have reached the Meader property except when carried by wind a distance of a mile and one-half to two miles. (Appellants' Exhibit 29)

It is undisputed that Food Machinery & Chemical Corporation spent $125,000.00 with Stanford Research Institute alone in studying the fluoride problem; that it was friendly with the Meader family, did everything to assist in determining the cause of their trouble at the Hatchery, offered to employ an ichthyologist or fish pathologist to come for a week's time, (R. 1006) but Warren Meader refused this offer.

However, after it was established that fluoride was not the cause of the trouble at the hatchery, Meaders sold the property for $200,000.00, and then suit was filed. (Appellees' Exhibit No. 13, R. 447)

III

STATEMENT OF THE ISSUES

Stated as concisely as possible, Appellants urge reversal of the judgment of the District Court for the following reasons:

1. The evidence is wholly insufficient to justify the verdict in that:

(a) The suit being predicated on the theory of private nuisance, and not negligence, there is no evidence that defendants' operations constituted such private nuisance to the business conducted by the plaintiffs.

(b) There is no evidence to establish a causal relationship between the fluoride emissions of defendants' plants, and any damage to plaintiffs' trout and trout eggs, the evidence affirmatively disclosing to the contary.

(c) The verdict of the jury, being unsupported by evidence of damage, was contrary to law and the evidence, and is so excessive that it obviously was the result of passion and prejudice.

2. The jury in returning its verdict disregarded positive, convincing and uncontradicted testimony of reliable, expert witnesses, whose testimony was neither discredited nor impeached, and which testimony was related to complex scientific matters of

inquiry beyond the realm of common or judicial knowledge or lay experience.

3. Certain errors in the admission and exclusion of evidence on the part of the trial court, and errors in the granting and refusal to grant certain instructions to the jury, are detailed in the Specifications of Error and in the Argument sections of this brief.

Appellants urge that all of the above are clearly established by the record in this case.

IV

SPECIFICATIONS OF ERROR

I

The Court erred in denying Appellants' motions for dismissal at the close of Appellees' case for the reasons stated in said motions. (R. 916-927, Vol. IV)

II

The Court erred in denying Appellants' motions for dismissal renewed at the close of Appellees' case for the reasons stated in said motions. (R. 1108-1109)

III

The Court erred in denying Appellants' motions for a directed verdict in favor of Appellants considered

at the time of motion for dismissal at the close of the case, (Clerk's Minutes, R. 69, Case 17058) to-wit:

> "Both defendants, J. R. Simplot Company and Food Machinery & Chemical Corporation renewed their motion for a directed verdict. Motion denied."

for the reasons set forth in both the motions for dismissal and the renewal of said motions, Specifications of Error I and II, supra, and for the further reason that Appellees failed to prove or show any causal connection between the emission of fluoride from Appellants' plants and the loss of trout and trout eggs.

IV

The Court erred in denying Appellants' motions for judgment notwithstanding the verdict for the reasons specifically set forth in said motions. (R. 75-82, Vol. I, Case 17058 as shown by the Court's order R. 87-88, Vol. I, Case 17058)

V

The Court erred in its refusal to give Appellants' requested Instruction No. 15, (R. 1125-1126) as follows:

> "You are instructed that if you consider the net profits received by the plaintiffs, on a yearly basis, in determining rental or use of the prem-

ises, you should deduct from such net profits a reasonable amount of salary for the plaintiffs."

for the reason that said instruction clearly stated the law and the refusal to give the same was objected to. (R. 1125)

VI

The Court erred in its refusal to give Appellants' requested Instruction No. 8, as follows:

"You are instructed that the defendants, or either of them, cannot be held liable unless as reasonable and prudent persons they were in possession of information or knowledge, or should have had such information and knowledge, that the plaintiffs' trout or trout eggs were likely to be damaged by their plant operations."

(R. 43, Vol. I, Case 17058, objection having been made to the Court's refusal, R. 1125)

VII

The Court erred in its refusal to give Appellants' requested Instruction No. 31, as follows:

"You are instructed that the burden is on the plaintiffs to show a fluorine content in their hatchery water that has been proven to be damaging to fish or fish eggs, and that plaintiffs' witness, Dr. Gale, fixed the amount of 3 ppm of fluorine as a level that could be maintained as a steady level and not be damaging, and that un-

less the plaintiffs have proven to your satisfaction by a preponderance of the evidence that a greater amount than this was maintained in the waters of the plaintiffs, that they cannot recover." (R. 67, Vol. I, Case 17058)

The refusal to give said instruction was objected to, (R. 1125) said instruction not only correctly stating the law but was based upon the only testimony in the record that attempted to fix a level of fluorine that could be maintained safely for trout and was based upon the most favorable testimony by Appellees' expert witness, Dr. Gale.

VIII

The Court erred in its refusal to give Appellants' Instruction No. 2, as follows:

"You are instructed that before you can return a verdict for the plaintiffs in this case you must first find that the defendants' plants were a nuisance, as the term has been defined, to the operation of the plaintiffs' fish hatchery." (R. 40, Vol. I, Case 17058)

The Court's refusal to give said instruction was objected to. (R. 1125, Vol. IV) Appellees' case was based entirely upon the theory of nuisance and the Appellants were entitled to said instruction.

IX

The Court erred in overruling the objections to the introduction of Appellees' Exhibits 1 to 9 inclu-

sive, (R. 927-928, Vol. IV) the Exhibits consisting of records of Food Machinery & Chemical Corporation that were given to counsel for Appellees and upon which Witness Kass was examined and cross-examined by counsel for Appellees. (R. 182-258, Vol. II) All of the information that was competent was testified to directly by the witness and all of the facts concerning notices or information that Food Machinery & Chemical Corporation had with reference to fluorine was brought out in the testimony of said witness. In addition, counsel for Food Machinery & Chemical Corporation offered to consent to an instruction covering the matter. (R. 848-856) The Exhibits contained irrelevant, prejudicial and objectionable statements and could only have been relevant on the theory of unlawfulness and punitive damage. The Court having held that Meaders were not entitled to punitive damage should not have permitted the introduction of the exhibits for the reasons given in the objections. (R. 173-176, 180-181)

X

The Court erred in permitting the cross-examination of Witness Kass as to Exhibits 1 to 9 inclusive after they had been marked and before they were admitted in evidence. (R. 182-258, Vol. II) The cross-examination of the witness on said Exhibits prior to their being admitted in evidence was objected to. (R. 201)

XI

The Court erred in sustaining an objection to Ap-

pellants' Exhibit 20 after the same had been admitted in evidence, (R. 1014-1019) the exhibit being a letter from one Drew to Phil Meader admissible for impeachment purposes, the proper foundation having been laid and the exhibit having been properly and correctly indentified. (R. 618-620)

XII

The Court erred in admitting Appellees' Exhibit 22 over objection, for the reason the same were not properly identified nor were proper foundations laid. (R. 660-668)

XIII

The Court erred in refusing to grant judgment notwithstanding verdict on motions of Appellants on grounds 6 and 7 of said motion, (R. 78, Vol. I, Case 17058) for the reason that the jury's verdict was excessive and was not related to any amount of damage that could have been awarded under the evidence and on the grounds that the verdict was given and damage assessed under the influence of passion, caprice or sympathy. The income reports as set forth in the statement of facts herein and the fact that Appellees made a profit of over $48,000.00 in the year 1955, shows conclusively that the verdict of the jury was in excess of any amount that could have properly been allowed.

XIV

The Court erred in sustaining the objection to Appellants' Exhibit 35 and in refusing to permit the

same to be received in evidence. (R. 988-990) This exhibit was produced by counsel for Appellees under an agreement made at the taking of the deposition of Warren Meader and is the result of an analysis of water sampling for fluorine content taken at the Meader Hatchery involving the years in question. It was in Appellees' possession and was competent in every respect and its rejection was prejudicial to the Appellants.

V

SUMMARY OF ARGUMENT AND AUTHORITY

A. APPELLEES HAVE UTTERLY FAILED TO SUSTAIN THEIR REQUIRED BURDEN OF PROOF IN ESTABLISHING A CAUSAL CONNECTION BETWEEN THE FLUORIDE EMISSIONS FROM APPELLANTS' PLANTS AND THE ALLEGED DAMAGE TO THEIR TROUT AND TROUT EGGS. FURTHER, THERE IS NO SUBSTANTIAL EVIDENCE THAT THE ALLEGED LOSS OF PROFITS BY APPELLEES WAS CAUSED IN ANY WAY OR CONTRIBUTED TO BY ANY CONDUCT OF APPELLANTS. FURTHER, THE EFFECT OF FLUORINE ON TROUT OR TROUT EGGS BEING A MATTER BEYOND COMMON KNOWLEDGE OF THE JURY OR JUDICIAL KNOWLEDGE OF THE COURT, SCIENTIFIC PROOF AND EXPERT TESTIMONY WAS A NECESSITY TO ESTABLISH SUCH CAUSE AND EFFECT.

20 *Am. Jur., Evidence,* Sec. 1207-1208

20 *Am. Jur.,* 111, Sec. 97

20 *Am. Jur.,* 133, Sec. 130

Adams v. Cloverdale Farms, (Ore.) 167 P. 1015

Arvidson v. Reynolds Metal Co., 125 F. Supp. 481, 236 F. 2d 224

Chapman v. Title Ins. & Trust Co., (Cal.) 158 P. 2d 42

Christensen v. Northern State Power Co., of Wisconsin, 25 N.W. 2d 659

City of Bethany v. Municipal Securities Co., (Okla.) 274 P. 2d 363

Crawfordsville v. Borden, 28 N.E. 849

DeGarza v. Magnolia Petro. Co., (Texas) 107 S.W. 2d 1078

Dixon v. Southern Pacific Co., 172 P. 368, Syllabus 5

Elam v. Loyd, 201 Okla. 222, 204 P. 2d 280

Erekson v. U. S. Steel, 260 F. 2d 423

Fitzpatrick v. Public Service Co., 131 A. 2d 634

Hagey, et al v. Allied Chemical & Dye Corp., (Cal.) 265 P. 2d 86

Hepner v. Quapaw Gas Co., (Okla.) 217 P. 438

Inter-Ocean Oil Co. v. Marshall, 26 P. 2d 399

Jackson v. Clark, 264 P. 2d 727

Lukenbill v. Longfellow Corp., 329 P. 2d 1036

Magnolia Petro. Co. v. Davis, (Okla.) 146 P. 2d 597

Magnolia Petro., et al v. Dexter, (Okla.) 57 P. 2d 1155

McNealy v. Portland Tractor Co., 327 P. 2d 410

Ogden v. Baker, (Okla.) 239 P. 2d 393

Oklahoma Natural Gas Co. v. Graham, 111 P. 2d 173

Parton v. Weillman, 158 N.E. 2d 719

Prest-O-Lite Co., Inc. v. Howery, (Okla.) 37 P. 2d 303

Reynolds v. Yturbide, 258 F. 2d 321

Richardson v. Parker, (Okla.) 235 P. 2d 940

St. Louis v. Firestone, 130 A. 2d 317

Shell Petro. Corp. v. Worley, 185 Okla. 265, 91 P. 2d 679

Sun-Ray Corp. v. Burge, 269 P. 2d 783

Teeter v. Municipal City of LaPorte, Ind., 139 N.E. 2d 158

Webber, et ux v. Pacific Power and Light, (Wash.) 242 P. 1104

Whitney v. Olson, (Okla.) 218 P. 2d 899

Wiggins v. Industrial Accident Board, 170 P. 9, Syllabus 3

Williams, et al v. Gulf Oil Corp., et al, 107 P. 2d 680

Winterberg v. Thomas, (Colo.) 1058 246 P. 2d

Wirz v. Wirz, 214 P. 2d 839, 15 A.L.R. 2d 1129

B. NEITHER THE COURT NOR JURY CAN IGNORE OR DISBELIEVE THE POSITIVE, UN-

CONTRADICTED TESTIMONY OF WITNESSES NOT IMPEACHED NOR DISCREDITED, AND A FACT CANNOT BE ESTABLISHED AS SUCH THROUGH CIRCUMSTANTIAL EVIDENCE WHEN THE SAME IS INCONSISTENT WITH DIRECT, UNCONTRADICTED, RELIABLE, UNIMPEACHED TESTIMONY THAT SUCH FACT DOES NOT EXIST.

20 *Am. Jur., Evidence*, Sec. 1189

20 *Am. Jur.*, Sec. 1207-1208

32 *C.J.S., Evidence*, Sec. 1039

Albrethsen v. Wood River Land Co., 40 Idaho 49, 231 P. 418

Aranguena v. Triumph Min. Co., 63 Idaho 769, 126 P. 2d 17

Beaver v. Morrison-Knudsen Co., 55 Idaho 275, 41 P. 2d 605

Bennett v. McCready, 356 P. 2d 712

Esso Standard Oil Co. v. Stewart, 59 S.E. 2d 67, 18 A.L.R. 2d 1319

First Trust & Sav. Bank v. Randall, 59 Idaho 705, 89 P. 2d 741

Kellar v. Sproat, et al., 35 Idaho 273, 205 P. 894

Odberg's Estate, 67 Idaho 447, 182 P. 2d 945

Peters v. Sacramento City Employees' Retirement System, 80 P. 2d 179

Pierstorff v. Gray's Auto Shop, 74 P. 2d 171

Quaker Oats v. Davis, 232 S.W. 2d 282

Sanderson's Case, 224 Mass. 558, 113 N.E. 355

Splinter v. City of Nampa, 256 P. 2d 215, Syl-

labus 1 to 3, inclusive, Idaho

Summerville v. Sellers, 94 S.E. 2d 69

Suren v. Sunshine Mining Co., 58 Idaho 101, 70 P. 2d 399

Thalheirner Brothers v. Buckner, 76 S.E. 2d 215

Thibadeau v. Clarinda Cooper Mining Co., 47 Idaho 119, 272 P. 254

William Simpson Const. Co., etal v. Industrial Accident Commission of California, etal, (Cal.) 240 P. 58

Williams v. Ford, 104 S.E. 2d 378

Wirz v. Wirz, 214 P. 2d 839, 15 A.L.R. 2d 1129

C. AT THE TIME OF TRIAL APPELLEES HAD IN THEIR POSSESSION REPORTS AND WATER ANALYSES OF VARIOUS SCIENTISTS EMPLOYED BY THEM TO MAKE SUCH REPORTS AND ANALYSES, AND APPELLEES' FAILURE TO MAKE SUCH EVIDENCE AVAILABLE OR TO PRODUCE THE SAME AT THE TIME OF TRIAL RAISES THE PRESUMPTION THAT THE TESTIMONY OF SUCH EXPERTS AND SUCH REPORTS AND ANALYSES WAS UNFAVORABLE TO THEIR CASE. THE FAILURE OF APPELLEES TO ELICIT FROM SAID EXPERTS OR FROM THEIR WITNESSES WIESE AND GALE THE CAUSE OF THE CONDITION IN THEIR TROUT AND TROUT EGGS WITH RESPECT TO DAMAGE BY FLUORINE RAISES THE PRESUMPTION THAT THE ANSWERS THERETO WOULD HAVE BEEN UNFAVORABLE TO THEIR CASE.

20 *Am. Jur.* 145, Sec. 140

20 *Am. Jur.* 188, Sec. 183

20 *Am. Jur.* 192, Sec. 187

Galloway v. U. S., 319 U.S. 372, 63 Sup. Ct. 1077, 87 L. Ed. 1458

D. THE JURY SHOULD HAVE BEEN INSTRUCTED THAT IF ANY DAMAGES WERE ALLOWED APPELLEES FOR A LOSS OF PROFIT FROM THEIR HATCHERY AND TROUT EGG BUSINESS, A REASONABLE REDUCTION BY WAY OF SALARY FOR SAID PERSONS SHOULD HAVE BEEN MADE IN ARRIVING AT THE AMOUNT OF SUCH DAMAGES.

15 *Am. Jur.*, *Damages*, Sec. 158

25 *C.J.S. Damages*, Sec. 90, Page 633, Footnote 99

Buck v. Mueller, 351 P. 2d 61

Columbus Mining Co. v. Ross, (Ky.) 290 S.W. 1052

Maddox v. International Paper Co., (La.) 47 F. Supp. 829

Molyneux v. Twin Falls Canal Co., 54 Idaho 619, 35 P. 2d 651

People v. San Francisco Savings Union, (Cal.) 13 P. 2d 498

E. THE MERE FACT THAT A DEFENDANT IS GUILTY OF SOME WRONGFUL ACT OR OF COMMITTING A NUISANCE, IF SUCH FACT IS

FOUND, DOES NOT ESTABLISH LIABILITY ON SAID DEFENDANT.

Cook v. Seidenverg (Wash.) 217 P. 2d 799

Eckerson v. Ford's Prairie School Dist. No. 11 of Lewis County, 3 Wash. 2d 475, 101 P. 2d 345

Sheridan v. Deep Rock Oil Co., (Okla.) 205 P. 2d 276

F. APPELLANTS HAVING FULLY MET AND REBUTTED ANY AND ALL LEGAL PRESUMPTIONS THAT EXISTED IN FAVOR OF APPELLEES, THE BURDEN OF PROOF SHIFTED BACK TO APPELLEES AND THE SAME WAS NOT SUSTAINED.

20 *Am. Jur.* 137, Sec. 134

20*Am. Jur.* 169, Sec. 164

20*Am. Jur.* 248, Sec. 256.1

First National Bank v. Ford, (Wyo.) 216 P. 691, 31 A.L.R. 1441

G. IT IS APPARENT THAT THE FLUORIDE EMISSIONS PER DAY FROM APPELLANTS' PLANTS BORE NO RELATION TO THE FLUORIDE LEVEL IN THE MEADER WATERS, NOR TO THE DAMAGE TO TROUT OR TROUT EGGS, THE 1955-1956 LOSSES BEING IDENTICAL TO THOSE IN 1953 AND 1954.

FURTHER, THE SURVEYS OF THE UNIVERSITY OF IDAHO INTRODUCED IN EVIDENCE ESTABLISHED CONCLUSIVELY THE

UTTER LACK OF CONTAMINATION OF THE MEADER WATERS BY FLUORINE.

IT IS FURTHER APPARENT THAT SINCE FROM THE RECORD THE APPELLEES SUSTAINED NO LOSS OF PROFITS IN THE YEAR 1953, IT BEING SHOWN THAT THE NET PROFIT TO THE HATCHERY IN THAT YEAR WAS THREE TIMES THE AMOUNT OF PROFIT IN ANY PRIOR YEAR, THE VERDICT OF THE JURY MUST HAVE BEEN BASED ON LOSS OF PROFITS FOR THE YEARS 1954, 1955 AND 1956. THE EVIDENCE AFFIRMATIVELY DISCLOSES DURING THE LATTER THREE YEARS NOT ONE WATER SAMPLE OR OTHER EVIDENCE THAT SAID WATERS AT THE HATCHERY CONTAINED FLUORIDE IN ANY AMOUNTS DAMAGING TO TROUT OR TROUT EGGS.

Exhibits 25, 26 and 27, reports from the University of Idaho.

H. APPELLEES WHOLLY FAILED TO ESTABLISH THE APPELLANTS MAINTAINED A PRIVATE NUISANCE WITH RESPECT TO APPELLEES' TROUT AND TROUT EGG BUSINESS.

Amphitheatres, Inc. v. Portland Metals, 198 P. 2d 847

Ebur v. Alley Metal Wire Co., 155 A. 280

Fritz v. E. I. DuPont, de Nemours & Co., 75 A. 2d 255

Kelly v. National Lead Co., 210 S.W. 2d 728

Koseris v. J. R. Simplot Co., _____Idaho _____, 352 P. 2d 235

McNichols v. J. R. Simplot Co. (1953), 74 Idaho 321, 262 P. 2d 1012

Peck v. Newburg Light, Heat & Power, 116 N. Y. S. 433

Washchak v. Robt. Y. Moffatt, et al, 109 A. 2d 310, 54 A.L.R. 2d 748

I. THE ADMISSION BY THE TRIAL COURT OF CERTAIN DOCUMENTARY EVIDENCE OVER APPROPRIATE AND VALID OBJECTION OF APPELLANTS, AND THE REJECTION BY THE TRIAL COURT OF CERTAIN DOCUMENTARY EVIDENCE OFFERED BY APPELLANTS WAS HIGHLY PREJUDICIAL AND CONSTITUTED REVERSIBLE ERROR.

VI

ARGUMENT

A. APPELLEES HAVE UTTERLY FAILED TO SUSTAIN THEIR REQUIRED BURDEN OF PROOF IN ESTABLISHING A CAUSAL CONNECTION BETWEEN THE FLUORIDE EMISSIONS FROM APPELLANTS' PLANTS AND THE ALLEGED DAMAGE TO THEIR TROUT AND TROUT EGGS. FURTHER, THERE IS NO SUBSTANTIAL EVIDENCE THAT THE ALLEGED LOSS OF PROFITS BY APPELLEES WAS CAUSED IN ANY WAY OR CONTRIBUTED TO BY ANY CONDUCT OF APPELLANTS. FURTH-

ER, THE EFFECT OF FLUORINE ON TROUT OR TROUT EGGS BEING A MATTER BEYOND COMMON KNOWLEDGE OF THE JURY OR JUDICIAL KNOWLEDGE OF THE COURT, SCIENTIFIC PROOF AND EXPERT TESTIMONY WAS A NECESSITY TO ESTABLISH SUCH CAUSE AND EFFECT.

We submit that Appellees have utterly failed to sustain their required burden of proof in establishing a causal relationship between the emission of fluorides from the plants of the Appellants, and the damage to their trout and trout eggs. Since we are here dealing with a complex matter requiring scientific proof, i.e. the effect of fluorine on trout and trout eggs, the burden was upon Appellees to establish by the testimony of experts or other scientific proof the damage was so caused. We submit the testimony of the experts on both sides of this lawsuit is compatible and uncontradictory and affirmatively proves that the damage to the trout and trout eggs was in fact in no way attributable to the emission from the Appellants' plants. From the state of the record, in the total absence of proof of cause and effect the judgment can be based only upon guess, conjecture and surmise.

Magnolia Petroleum Co. v. Davis, (Okla.) 146 P. 2d 597, was an action to recover damages for pollution of a stream due to salt water escaping from oil and gas wells. Judgment for the plaintiff was reversed on appeal. It was claimed that fish died as a result

of salt in the water and that trees were killed therefrom. We quote the following:

> "The above conclusion of the witnesses that the salt water destroyed the fish and timber was based entirely on the assumption that the salt content was sufficient to bring about that result. That assumption was wholly without foundation in actual experience of the witnesses, or knowledge of the salt content of the water, and without the aid of visible effects peculiarly associated with salt water damage that would in some acceptable degree distinguish the asserted cause of destruction from any number of other possible causes.
>
> "The mere fact that water tasted salty will not support an inference of evidential verity that dead fish found in such water, and dead trees near by were destroyed as a result of the salt content of the water. Nor will the courts take judicial notice that such result will follow. Shell Petroleum Corp. v. Worley, 185 Okla. 265, 91 P. 2d 679, 680.
>
> "The evidence having so failed, the trial court should have sustained the separate motions of defendants for directed verdict. The pronouncement of this court in the case last cited fully governs our decision here. It was there held as follows: 'The court will not take judicial notice that water which merely tastes salty contains sufficient salt to kill or injure growing trees.'
>
> "Defendants showed by the testimony of ex-

pert witnesses that numerous scientific tests of the water and soil on plaintiff's land failed to indicate sufficient salt content therein to cause any part of the injuries complained of. That evidence was wholly uncontradicted. However, had defendants produced no such evidence, plaintiff's case would have failed for want of proof of causal connection."

That salt in sufficient quantities will kill any type of vegetation, and that it will kill animals is well known, but we find that this is not a matter of judicial knowledge or of common knowledge, and we submit that this case is a full and complete answer to the contention and argument of Appellees as to the inferences that can be drawn, as to the right of jurors to completely disregard undisputed, expert testimony, and as to the necessity of requiring expert testimony to establish the amount of fluoride necessary to damage trout or trout eggs.

In *Prest-O-Lite Co., Inc. v. Howery,* (Okla.) 37 P. 2d 303, a case where plaintiff sued for damages arising out of pollution of a stream, the verdict rendered in favor of the plaintiff was reversed on appeal. It was the plaintiff's contention that his livestock, chickens, ducks, brood sows and cows were damaged by reason of pollution of his stream with salt. The plaintiff's testimony, with reference to his chickens, follows closely the pattern of the testimony of the Meaders, and especially Phil Meader, who undertook to tell what caused the damage and how the fish were affected, and we quote from the opinion as follows:

" 'Q. Now, tell the jury how these chickens were effected? A. Well sir, they just—some of them just fall over dead, and some of them would droop around for a few days, and they would just get so they couldn't walk, they would just set down and they never could get up any more.

" 'Q. And they would die, how many a day? A. Well, I have seen as high as fifteen to twenty-five.

" 'Q. You would find them dead in the morning when you went out? A. Yes, sir.

" 'Q. You think you averaged some fifteen to twenty-five chickens that died every twenty-four hours, is that right? A. Yes, sir.'

"Plaintiff also testified that a brood sow and four shoats died and that two cows lost their calves and were further depreciated and damaged in value. He also testified that the fowls and stock had access to the water in the creek; that he did not attempt to prevent them from drinking creek water since at the time he did not know that there was anything wrong with the water. He further testified that he did not know why the fowls and stock died; that none of the chickens were examined to determine the cause of their death, but that he did call a veterinarian to see his cow when it was sick. The veterinarian testified that the cow was suffering from enteritis or inflammation of the bowls,

and he assumed that drinking this water from the creek was the cause of the trouble since he could find no other cause therefor. He did not make an analysis of the water, but placed his hand in the creek water and noticed that it caused a "puckery" feeling.

"In the light of these authorities the recovery by plaintiff herein cannot stand. While the proximate cause may be proved by circumstantial evidence, a recovery cannot be had by adding inference to inference or presumption to presumption, and the want of evidence cannot be thus supplied by deductions. If it had been proved that at the time the injuries were incurred there were poisonous or deleterious substances in the water, harmful to animal life, or if it had been proved that the animals and fowls died as a result of drinking the water, a different situation would prevail, but the failure to prove one of these circumstances is fatal to plaintiff's right of recovery."

It is undisputed that there is fluoride in all waters, that there is fluoride in the soil, and in vegetation, but for it to be damaging to animals it must reach a certain concentration. The burden was upon the plaintiffs in this case to prove that such a concentration was present. They not only did not prove it in the evidence introduced by them, but the experts for both Appellants and Appellees proved the contrary.

One sampling from flowing water taken in 1953

at an indeterminate time over a four-year period showing 4.7 ppm of fluoride cannot prove that the water retained that concentration for any length of time. The proof does, however, show that water samples in the same and subsequent years did not in any instance show a fluoride concentration damaging or injurious to trout or trout eggs. To contend otherwise is simply to ignore the evidence and to say that the scientific analysis shall be disregarded in all but one of some 96 samplings, and to reason erroneously that the one sample showing 4.7 ppm establishes a concentration of fluoride in the waters for a period of four years.

In addition, there is no proof whatever that there were any trout in the spring from which this isolated, unreliable analysis of 4.7 ppm shows up, but assuming there were trout in that particular spring were they adult trout, were they fingerling or what size trout were they? The record is silent on this score. Was this in a spring where the water flowed into the hatchery troughs? This certainly could not be, as the record shows without dispute that there was never a sampling of water in the hatchery troughs where the fluorine analyses exceeded 1 ppm. We submit guess, conjecture and surmise is not substantial proof.

In *Christensen v. Northern States Power Co. of Wisconsin,* (Minn.) 25 N.W. 2d 659, plaintiffs had leased a lake for the purpose of raising minnows and fish for sale. The defendants had erected a tower

in the lake to carry their power lines. The lines carried 66,000 volts of electricity and because of an ice condition the defendants attempted to blast the ice in order to protect their tower, the result being that the tower fell into the lake and current shorted into the water for a period of some 4 seconds. A great many of the fish died shortly thereafter. From a judgment for the plaintiffs on appeal the Supreme Court reversed the same, saying:

> "The real question presented for decision is whether or not there is sufficient evidence that either the electric current or the dynamite killed the fish * * *
>
> "What effect electricity would have is a matter which this Court cannot take judicial notice, for the simple reason it is not a matter of common knowledge * * *
>
> "For the same reason they cannot take judicial notice of the effect of electricity upon the water, we cannot do so with reference to the blasts of dynamite.
>
> "The contention that all the minnows and fish, or even a sufficient part of them in a lake of this size were killed by these blasts would likewise be merely speculative and conjectural."

If the Court cannot take judicial notice that 66,000 volts of electricity will damage fish life in water, when the courts uniformly recognized the deadly effect of electricity in water, how can it be argued

that the court or jury in the instant case could take such notice, absent any proof, of the amount of fluoride concentration, which must exist in water, to kill trout daily by the tons for over a period of some four years, or to affect the eggs of trout.

As was said in the case of *Whitney v. Olson*, (Okla.) 218 P. 2d 899, the number of causes that could have been responsible for an injury claimed by the plaintiffs in that case was limited only by the extent of the imagination.

The statement of counsel for plaintiffs (R. 123) and the testimony of Witness Nelson (R. 348-373) clearly set forth the great variety of causes to which the loss of plaintiffs' trout and the failure of the eggs to hatch could be attributed. This principle is also supported by *Hepner v. Quapaw Gas Co.*, (Okla.) 217 P. 438.

In *Teeter v. Municipal City of LaPorte*, (Ind.) 139 N.E. 2d 158, the Supreme Court stated that it judicially knew that the fluoridation of public water supply is a reasonable exercise of the police powers, but the Court pointed out that it was not in a position to hold conclusively as a matter of law as to the effect of fluorine.

The question of the effect of fluoride on the cellular system of any animal is based upon scientific fact, and the Court will not take judicial notice of scientific matters of uncertainty or matters which are in dispute. The Court will not take judicial notice of

powder magazines, or inflammable liquids, 20 *Am. Jur.* 111, Sec. 97; 133 Sec. 130.

> "Courts cannot take judicial notice of what percentage of mineral can be extracted from a particular class of ore, which is a matter of proof in each particular case where material." *Dixon v. Southern Pac. Co.*, 172 P. 368

> "It is not a known law of nature of which the court may take judicial notice that metals such as iron and steel possess properties which perceptibly attract lightning and enhance the danger from lightning within the sphere of their influence." *Wiggins v. Industrial Accident Board*, 170 P. 9

There are two cases in the Circuit Court of Appeals, Ninth Circuit, involving damage by fluoride. *Arvidson v. Reynolds Metal Company*, 125 F. Supp. 481, affirmed in 236 F. 2d 224, and *Reynolds v. Yturbide*, 258 F. 2d 321. The *Arvidson* case is for nuisance and the *Yturbide* case is based upon negligence. There is one fluoride case in the Tenth Circuit, *Erekson v. U. S. Steel*, 260 F. 2d 423, a Utah case tried upon exactly the same theory and under similar pleadings as the case at bar.

The *Arvidson* case involved damage to cattle and the *Erekson* case damage to cattle, sheep and plant life. The *Yturbide* case was one for personal injury. All of these cases are important both on the question of whether expert testimony is necessary in proving

damage to animal life by fluorides, the amount of proof necessary, and what amounts to causal connection.

In the *Arvidson* case the Trial Court had the following to say:

> "When all these matters are considered, it can be seen that any specific finding of fluorine content in forage on the particular property of any plaintiff must be very largely if not wholly a matter of speculation and conjecture. * * *
>
> "Plaintiffs have not sustained the burden of producing a preponderance of credible evidence to establish (a) fluorine content in the forage on their lands in amounts above non-toxic limits; (b) substantial fluorine content in forage attributable to effluents from defendant's plants; or (c) that plaintiff's lands or cattle sustained fluorine damage in particulars with reasonable or any certainty. * * * "

The Ninth Circuit by affirming the lower court approved the foregoing statement of the trial judge as to the elements necessary to establish liability on a defendant in a nuisance case.

The *Yturbide* case is important since all of the opinions disclose the necessity of establishing claimed damage from fluoride through expert testimony. There was a substantial dispute among the experts, and the Court found the expert testimony of the plaintiffs reasonable and that it substantiated the claim of damage.

There can be no contention that without an examination of the individuals by the medical experts and without their direct testimony that the plaintiffs had fluorosis the plaintiffs otherwise could have recovered. The fact standing alone that Reynolds Metal Company was negligent in the *Yturbide* case in allowing excessive amounts of fluoride to be emitted did not prove the plaintiffs' case. Additionally, expert testimony was required to relate the emissions of fluorides to the damage suffered by the plaintiffs.

In the *Ereskson* case we find the following statement by the Tenth Circuit:

> "From the scientific proof, the referee found, and the appellee concedes, that during the years complained of, potentially harmful quantities of fluorine gases did emanate from the appellee's Genēva Plant; that it did fall upon the appellants' lands and vegetation in varying quantities; and that such vegetation was consumed by the appellants' livestock. And, the appellees further concedes its legal liability for any substantial harm caused thereby. And see Reynolds Metal Co. v. Yturbide, 9 Cir., 258 F. 2d 321; E. Rauh & Sons Fertilizer Co. v. Shreffler, 6 Cir., 139 F. 2d 38; Anderson v. American Smelting & Refining Co., D.C., 265 Fed. 928.
>
> "Based upon controlled experiments and other scientific analysis, the referee established a 'tolerance level' below which the ingestion of fluorine by livestock was found to be harmless

and above which there was a possibility, and then a probability of harm. * * * From evidence of scientific forage sampling and atmospheric tests, the referee suggested, and the trial court found, that in a number of areas involved, fluorine in forage reached the border-line level of harmful concentration. And it was therefore necessary to consider the available data relating to specific levels of exposure in connection with the claims of each claimant."

Now, in the instant case, even if it could be assumed that the Court could hold, or the jury could say, potentially harmful quantities of fluoride particulates did emanate from Appellants' plants in an amount to be harmful to livestock, that by reason of the location of Appellees' property that such quantities did fall on the vegetation on the Meader lands which could be damaging to livestock, that certainly is absolutely as far as the Court or the jury could go. Under the evidence there is no proof that these particulates in any way affected the fluoride content of the Meader water, that they in any way were ingested by fish at the Hatchery, that fish consumed such fluoride or that the fluoride content of the water previous or subsequent to the erection and operation of the plants and their operation, was changed in any manner.

B. NEITHER THE COURT NOR JURY CAN IGNORE OR DISBELIEVE THE POSITIVE, UNCONTRADICTED TESTIMONY OF WITNESSES NOT IMPEACHED NOR DISCREDITED, AND A

FACT CANNOT BE ESTABLISHED AS SUCH THROUGH CIRCUMSTANTIAL EVIDENCE WHEN THE SAME IS INCONSISTENT WITH DIRECT, UNCONTRADICTED, RELIABLE, UNIMPEACHED TESTIMONY THAT SUCH FACT DOES NOT EXIST.

It is firmly established by the decisions of the Supreme Court of the State of Idaho, as well as many other jurisdictions, that where the testimony of competent witnesses is uncontradicted it cannot be disregarded by courts and juries.

Also, where expert testimony is necessary and required to prove a fact such testimony cannot be ignored.

The case of *Esso Standard Oil Co. v. Stewart*, (Va.) 59 S.E. 2d 67, 18 A.L.R. 2d 1319, is directly in point. A verdict for the plaintiff was reversed on appeal. Involved was an action for damages by reason of smoke from an oil furnace upon which the defendant's employee had worked. There is a thorough discussion in the annotation at 18 A.L.R. 2d 1319. The principle laid down is firmly established in the law.

It certainly is not without significance that the *Esso* case and the annotation, supra, are cited, approved, and adopted as the law of the State of Idaho. In *Splinter v. City of Nampa*, 256 P. 2d 215, the Court disposes of the plaintiff's position in the instant case, and especially the proposition of law now referred when it said:

"Therefore, the positive testimony of the man who delivered the gas is not inconsistent with any of the circumstances established by other evidence, and not being improbable or otherwise discredited, it is entitled to credit. Sullivan v. Northern Pac. Co., 109 Mont. 93, 94 P. 2d 651; Esso Standard Oil Co. v. Stewart, 190 Va. 949, 59 SE 2d 67, 18 ALR 2d 1319; Pierstorff v. Gray's Auto Shop, 58 Ida. 438, 74 P. 2d 171; First Trust & Savings Bank v. Randall, 59 Ida. 705, 89 P. 2d 741; In re: Odberg's Estate, 67 Ida. 447, 182 P. 2d 945."

The Idaho cases of *Beaver v. Morrison-Knudson Co.*, 55 Idaho 275, 41 P. 2d 605; *Suren v. Sunshine Mining Co.*, 58 Idaho 101, 70 P. 2d 399; *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 231 P. 418 and the many other cases referred to therein support the principle of the weight accorded positive, uncontradicted testimony and unless Appellees are able to show that the rule is otherwise the judgment cannot stand.

In *Engelking v. Carlson*, (Cal.) 88 P. 2d 695, the court held that the determination whether or not a physician possessed the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality could only be determined by experts, stating:

"When the matter in issue is one within the knowledge of experts only and is not within the

common knowledge of laymen, the expert evidence is conclusive."

Likewise, in *William Simpson Const. Co., et al v. Industrial Accident Commission*, (Cal.) 240 P. 58 we find:

> "Whenever the subject under consideration is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue. It follows that in such cases neither the court nor the jury can disregard such evidence of experts, but, on the other hand, they are bound by such evidence, even if it is contradicted by non-expert witnesses."

See also: *American National Insurance Co. v. Smith*, (Tenn.) 74 S.W. 2d 1078; *Scott v. Liberty Mutual Insurance Co.*, (Tex.) 204 S.W. 2d 16; *Harris v. Nashville C. and St. L Ry.*, (Ala.) 44 S. 962; *Kramer Service v. Wilkins*, (Mo.) 186 S. 625; *Hinnenkamp v. Metropolitan Life Ins. Co.*, (Neb.) 279 N.W. 784; *Johnson v. Agerbeck*, (Minn.) 77 N.W. 2d 539; *Kundiger v. Prudential Life Ins. Co.*, (Minn.) 17 N. W. 2d 49; *Ayers v. Parry*, 192 F. 2d 181.

Another case clearly illustrating this principle is that of *Ewing v. Goode*, 78 F. 442 (CCA 7), where we find this statement:

> "In many cases, expert evidence, though all tending one way, is not conclusive upon the court and jury, but the latter, as men of affairs,

may draw their own inferences from the facts, and accept or reject the statements of the experts; but such cases are where the subject of discussion is on the borderline between the domain of general and expert knowledge, as, for instance, where the value of land is involved, or where the value of professional services is in dispute. There the mode of reaching conclusions from the facts when stated is not so different from the inferences of common knowledge that expert testimony can be anything more than a mere guide. But when a case concerns the highly specialized art of treating an eye for cataract, or for the mysterious and dread disease of glaucoma, with respect to which a layman can have no knowledge at all, the court and jury must be dependent upon expert evidence. There can be no other guide, and, where want of skill or attention is not thus shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury."

See also: *Commonwealth Life Insurance Co. v. Harmon,* (Ala.) 153 S. 755; *Life and Casualty Co. v. Burke,* (Ala.) 88 S. 2d 338.

In *Kellar v. Sproat, et al,* 35 Idaho 273, 205 P. 894, the Court said, "Testimony as to value is generally to be given by experts."

If the value of land is not within the common knowledge of jurors in the State of Idaho, how can it be claimed that the question of damage to trout or

trout eggs by fluoride is a matter of common knowledge and that it is not subject to proof by expert testimony.

Assuming for the purpose of argument that jurors may disbelieve experts or any witness in their entirety and are not bound to accept positive testimony, then plaintiffs are bound by the reasoning in *William Simpson Const. Co., et al v. Industrial Accident Commission*, (Cal.) 240 P. 58, and *In re Sanderson's Case*, 224 (Mass.) 558 113 N.E. 355.

It is elemental that the refusal to believe the testimony of a witness or to disregard the statement of a witness does not establish proof contrary to such statement. Failure to believe a statement of facts does not establish anything to the contrary.

Appellants realize that Appellees could prove their case by the introduction of both expert and lay testimony, but there must be some point at which the expert and lay witnesses coincide.

It is recognized that those with long, practical experience are quite often allowed to testify with reference to disease of animals or the affect upon animals of certain poisons or to the disease of the same, but here we have the Appellees offering the testimony of numerous fish hatchery men experienced in the handling of trout and trout eggs, without first making any attempt whatever to qualify such persons as experts.

It is necessary to study the testimony of Appellees' expert witness, Gale, to determine what he really

gave as an opinion, and the effect of his testimony. His testimony was to the effect that cells of animals, coming in contact with 3 ppm fluorine would suffer some damage but that they would recover and that a trout would do well in water of 3 ppm fluorine, or in waters of a level less than 4.5 ppm fluorine.

The testimony of Dr. Gale did not in any way conflict with the testimony of Appellants' experts insofar as the Meader trout or eggs were concerned. He did not testify that any damage thereto resulted from Appellants' emissions of fluorine.

Appellees' case rests entirely on conjecture. Without proof of damage from Appellants' manufacturing processes, merely because of the proximity of the plants, and the loss of fish and fish eggs being above normal losses, Appellees contend the proximate cause of their damage was fluorosis resulting from Appellants' fluoride emissions.

C. AT THE TIME OF TRIAL APPELLEES HAD IN THEIR POSSESSION REPORTS AND WATER ANALYSES OF VARIOUS SCIENTISTS EMPLOYED BY THEM TO MAKE SUCH REPORTS AND ANALYSES, AND APPELLEES' FAILURE TO MAKE SUCH EVIDENCE AVAILABLE OR TO PRODUCE THE SAME AT THE TIME OF TRIAL RAISES THE PRESUMPTION THAT THE TESTIMONY OF SUCH EXPERTS AND SUCH REPORTS AND ANALYSES WAS UNFAVORABLE TO THEIR CASE. THE FAILURE OF APPELLEES TO ELICIT FROM SAID

EXPERTS OR FROM THEIR WITNESSES WEISE AND GALE THE CAUSE OF THE CONDITION IN THEIR TROUT AND TROUT EGGS WITH RESPECT TO DAMAGE BY FLUORINE RAISES THE PRESUMPTION THAT THE ANSWERS THERETO WOULD HAVE BEEN UNFAVORABLE TO THEIR CASE.

It was disclosed at a meeting of all counsel with the Court at a pre-trial hearing (R. 112-129) that the Appellees had had work done by experts with the Utah State College and that their counsel expected to have one or two experts testify to the effect of fluorine in general in the area. (R. 116) Appellees' counsel was asked specifically by the Court about bringing in the expert witnesses from Utah who had conducted such experiments. (R. 123) It was further stated (R. 125-126) that scientific evidence would be produced by Appellees to prove their case.

Appellees had in their possession reports and analyses by Dr. Greenwood and Dr. Ziegler of the Utah State University, and they had in their possession water analyses made by Dr. Leonard, but they failed and refused to use or introduce this testimony, the presumption being that the testimony was unfavorable to them.

> "The broad rule prevails that the omission by a party to produce important testimony relating to a fact of which he has knowledge, and which is peculiarly within his control, raises the

presumption that the testimony, if produced, would be unfavorable to his cause." 20 *Am. Jur.* 145, Sec. 140.

"It is a well-established rule that where relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the jury may draw an inference that such evidence would be unfavorable to him. This rule is uniformly applied by the courts and is an integral part of our jurisprudence. If weaker and less satisfactory evidence is given and relied on in support of a fact when it is apparent to the court and jury that proof of a more direct and explicit character is within the power of the party, it may be presumed that the better evidence, if given, will be unfavorable to him." 20 *Am. Jur.* 188, Sec. 183

"It is well settled that if a party fails to produce the testimony of an available witness on a material issue in the cause, it may be inferred that his testimony, if presented, would be adverse to the party who fails to call the witness." 20 *Am. Jur.* 192, Sec. 187

The above rules are applicable in the instant case, and we seriously urge this point. Dr. Gale is a resident of Pocatello, he knows the location of the defendant plant, he is the head of the Pharmacy School at Idaho State College where an analysis could readi-

ly have been made of fish and fish eggs or of the water at the Meader Hatchery, but his testimony is to the effect that:

> "Q. In order to tell anything about a fish in the water at the Meader Hatchery you would have to make an analysis of the water and the fish and know the background wouldn't you?
>
> "A. Yes, sir." (R. 289)

It was disclosed that this witness had never been asked to analyze any of the water at the hatchery, (R. 284-286, 288) that he had never made any examination whatever of the water at the Hatchery or the fish, and that his testimony is limited to cell life as a general proposition. He stated as follows:

> "A. One of us is mixed up. I was asked to testify to the toxicity of fluoride. I do not mean to be rude, but I am not an expert on fish." (R. 289)

Another of Appellees' witnesses, Dr. Weise of the University of Idaho, who testified by desposition, certainly knew from his water survey of the area the fluoride content, if any, in the Meader waters that was of such toxicity as to be damaging to cell life, but he was not asked for an opinion.

Appellants' Exhibit 17 was a complete fluorine analysis of fish, large and small, from the Meader Hatchery made by Dr. Greenwood for Appellees and a complete fluorine analysis of the runoff water from the soil into hatchery waters.

What was his opinion as to whether the fluoride content was dangerous or damaging to trout? If that opinion had been favorable to Appellees he would have been called.

Appellees had available their own surveys and reports, and fluorine analyses of water and fish. Even-handed justice required that they use their experts if the testimony was favorable. Of course, it is obvious they could not.

D. THE JURY SHOULD HAVE BEEN INSTRUCTED THAT IF ANY DAMAGES WERE ALLOWED APPELLEES FOR A LOSS OF PROFIT FROM THEIR HATCHERY AND TROUT EGG BUSINESS, A REASONABLE REDUCTION BY WAY OF SALARY FOR SAID PERSONS SHOULD HAVE BEEN MADE IN ARRIVING AT THE AMOUNT OF SUCH DAMAGES.

Appellants asked for and were denied an instruction that if the jury considered the net profits from the hatchery business to the Appellees on a yearly basis in determining rental value of the premises that a reasonable amount for the salaries of Appellees for their services rendered should be deducted from such net profits.

The record discloses Appellees' son, after 1950 and into 1954, was employed to run the hatchery business at one-third of the net profits received from the business. (Appellees' Exhibit 14; R. 449-453, 544) May Meader, one of the Appellees, testified in the affirma-

tive when asked on cross-examination whether or not a third of the profits was a reasonable wage or salary for operating the business. (R. 776) The Appellees' tax returns, in evidence, do not disclose any salary for Appellees as a deductible expense. (R. 796)

In support of this proposition we refer to the following statement from the text:

> "In commerce profits mean the advance in the price of goods sold beyond the cost of purchase. In distinction from the wages of labor, they are understood to imply the net return to capital or stock employed, after deducting all expenses, including not only the wages of those employed by the capitalist, but also the wages of the capitalist himself for superintending the employment of his capital stock." 15 *Am. Jur., Damages* Sec. 158

> "Value of the plaintiff's services in the performance of the contract is an item to be considered in the cost of performance." 25 C.J.S. *Damages* Sec. 90, Page 633, Footnote 99

Likewise, supporting this contention is *Maddox v. International Paper Co.*, (La.) 47 F. Supp. 829. This case involved a suit by the owner of a commercial fishing camp against the defendant company for the destruction of his fishing business as a result of the discharge of waste products from the paper mill of the defendant. The proof clearly established plaintiff's business was destroyed and that prior to its destruction plaintiff enjoyed a net profit of $3,000.00

per year. In the face of this proof the Court, however, awarded only the sum of $2,000.00 per year for the period covered. The reduction of $1,000.00 being made upon the following basis:

> "It may be stated that as a general rule in tort actions a recovery may be had for loss of profits, provided their loss is the proximate result of defendant's wrong and they can be shown with reasonable certainty. In commerce profits means the advance in the price of goods sold beyond the cost of purchase. In distinction from the wages of labor they are understood to imply the net return to capital or stock employed after deducting all the expenses, including not only the wages of those employed by the capitalist but also of the capitalist himself for superintending the employment of his capital stock."

See also *Molyneux v. Twin Falls Canal Co.*, 54 Idaho 619, 35 P. 2d 651; *Columbus Mining Co., v. Ross*, (Ky.) 290 S.W. 1052; *People v. San Francisco Savings Union*, (Cal.) 13 P. 498. We refer also to the case of *Buck v. Mueller*, (Ore.) 351 P. 2d 61, which was an action by a tenant to recover damages for alleged breach of a covenant to renew a lease. In determining what the damages were the Court stated:

> "In computing the cost of operating the business, plaintiff must include the value of his own services and those of his wife. * * * The Court found that the reasonable value of the services of plaintiff and his wife and the reasonable value

of meals withdrawn by them was $1,362.20. The Court deducted this amount from the sum of $1,775.14 in computing the loss of profits."

We submit, therefore, that under the foregoing citations the trial court erred in not so instructing the jury that from the profits accruing to Appellees from their hatchery business there should be deducted a reasonable amount for their services rendered before they could consider such profit in connection with the reasonable rental value of the premises, which was the applicable measure of damages.

E. THE MERE FACT THAT A DEFENDANT IS GUILTY OF SOME WRONGFUL ACT OR OF COMMITTING A NUISANCE, IF SUCH FACT IS FOUND, DOES NOT ESTABLISH LIABILITY ON SAID DEFENDANT.

It seems to be Appellees' contention that because Appellants permitted the emission of fluorides, knowing it was toxic, this alone established a case for the jury, and that if the loss to the Appellees is not otherwise accounted for by Appellants Appellees are entitled to a verdict.

Such is not the law, even though there is a violation of an ordinance or statute which is negligence per se, the violation is not actionable unless proximate cause is shown, and plaintiffs must show a causal connection. See *Cook v. Seidenverg*, (Wash.) 217 P. 2d 799:

"In Eckerson v. Ford's Prairie School Dist. No. 11 of Lewis County, 3 Wash. 2d 475, 101 P.

2d 345, 349, we defined the term 'proximate or legal cause' as follows: 'An actual cause, or cause in fact, exists when the act of the defendant is a necessary antecedent of the consequences for which recovery is sought, that is, when the injury would not have resulted but for the act in question. But a cause in fact, although it is a sine qua non of legal liability, does not of itself support an action for negligence. Considerations of justice and public policy require that a certain degree of proximity exist between the act done or omitted and the harm sustained, before legal liability may be predicated upon the 'cause' in question. It is only when this necessary degree of proximity is present that the cause in fact becomes a legal, or proximate cause.' "

See also *Sheridan v. Deep Rock Oil Co.*, (Okla.) 205 P. 2d 276:

"The essential elements of 'actionable negligence' where the wrong is not wilful or intentional, are the existence of a duty of defendant to protect plaintiff from injury, failure of defendant to perform that duty and injury to plaintiff proximately resulting from such failure.

"Regardless of the extent to which defendant may be guilty of negligence, no recovery may be had unless plaintiff's injury was proximately and directly caused by such negligence.

"In a negligence case, where all of the evi-

dence favorable to plaintiff, together with all inferences and conclusions to be reasonably drawn therefrom is insufficient to point out clearly a causal connection between the alleged negligence and the injury, and no element of wilful or intentional wrong is present, the question of proximate cause is one of law."

F. APPELLANTS HAVING FULLY MET AND REBUTTED ANY AND ALL LEGAL PRESUMPTIONS THAT EXISTED IN FAVOR OF APPELLEES, THE BURDEN OF PROOF SHIFTED BACK TO APPELLEES AND THE SAME WAS NOT SUSTAINED.

Even under Appellees' contention that a presumption existed in their favor and Appellants were required to meet the burden, Appellants having done so and produced positive and undisputed testimony which neither the Court nor the jury could legally disregard, the burden again shifted to Appellees who made no attempt to meet the same.

> "Presumptions are intended to supply the place of facts; they may never be used to deny the existence of, or contradict plain and established facts." 20 *Am. Jur.* 169, Sec. 164
>
> "Ordinarily the effect of scientific principles and natural laws in reference to evidence is considered in determining the weight and sufficiency of the evidence in a particular case to support a verdict." 20 *Am. Jur.* 248, Sec. 256.1
>
> "The burden of going forward with the evi-

> dence, which is imposed upon a party when his adversary, who has the burden of proof upon the whole case, makes out a prima facie case or establishes facts which give use to a presumption in his favor, is met by evidence which balances that introduced by the latter, and the burden then shifts back." 20 *Am. Jur.* 137, Sec. 134

After Wohlers and Wood disproved Appellees' claim of fluoride damage, and after the fluorine analysis of the fish and of the leaves the day of the loss in September 1954, the burden was on the plaintiffs to at least contradict such proof if they claimed it of no probative validity.

Appellees' experts were available to disprove Kass's testimony that there was no change in the particulate matter in the shale as mined, and after processing. If Appellees disputed the fact, they had ample opportunity to show that the analysis of a sample from still water in a spring where the shale was mined was not valid. Of course, they could not meet the burden, "the ice was too thin."

G. IT IS APPARENT THAT THE FLUORIDE EMISSIONS PER DAY FROM APPELLANTS' PLANTS BORE NO RELATION TO THE FLUORIDE LEVEL IN THE MEADER WATERS, NOR TO THE DAMAGE TO TROUT OR TO TROUT EGGS, THE 1955-1956 LOSSES BEING IDENTICAL TO THOSE IN 1953 AND 1954.

FURTHER, THE SURVEYS OF THE UNIVERSITY OF IDAHO INTRODUCED IN EVI-

DENCE ESTABLISH CONCLUSIVELY THE UTTER LACK OF CONTAMINATION OF THE MEADER WATERS BY FLUORINE.

IT IS FURTHER APPARENT THAT SINCE FROM THE RECORD THE APPELLEES SUSTAINED NO LOSS OF PROFITS IN THE YEAR 1953, IT BEING SHOWN THAT THE NET PROFIT TO THE HATCHERY IN THAT YEAR WAS THREE TIMES THE AMOUNT OF PROFIT IN ANY PRIOR YEAR, THE VERDICT OF THE JURY MUST HAVE BEEN BASED ON LOSS OF PROFITS FOR THE YEARS 1954, 1955 AND 1956. THE EVIDENCE AFFIRMATIVELY DISCLOSES DURING THE LATTER THREE YEARS NOT ONE WATER SAMPLE OR OTHER EVIDENCE THAT SAID WATERS AT THE HATCHERY CONTAINED FLUORIDE IN ANY AMOUNTS DAMAGING TO TROUT OR TROUT EGGS.

Appellees tried their case upon the theory of contamination of vegetation, and showed the results of vegetation sampling for fluorine in the Pocatello area. But, there was a complete lack of testimony to show any connection or tie between the fluorine content of vegetation samples and that of the water samples.

While the analysis of vegetation in the area showed an elevation of fluoride content in relation to the Appellants' plants, however it is elemental this was because the stationary vegetation would collect and

breathe dust and effluents including fluoride. But this is definitely not true of constantly flowing water. There is no evidence in the record recognizing any problem of the contamination of flowing water by fluoride from the atmosphere, and in fact the record shows such possible contamination does not exist.

Pollution of water is not caused by airborne effluents, but by the direct flow of waste material into the water. No cases exist where flowing water is affected by airborne fluoride, but there are cases where fluoride is directly deposited in water.

The testimony of Dr. Gale was not based in any respect upon the conditions at the Meader Hatchery where there is a constant flow of water, and he made this very clear:

Dr. Gale:

> "A. Well, 4.5 parts per million would not accommodate a trout in its natural state.
>
> "Q. In a stream?
>
> "A. You cannot do it on a stream. There are too many problems of the stream, and the volume of flow." (R. 286)
>
> "Q. Now, in our illustration that we have been using yesterday and today, of fish in water of 4.5 parts per million, do you assume it to be soft water or hard water in connection with your answers?"

Dr. Gale:

> "A. I was not assuming it to be water in the first place in my answer in the sense that you are now using it—not as river water or spring water, but as the total ingestion of parts per million of fluoride at 4.4." (R. 310)

Dr. Gale also made it clear that he was not assuming the fish got 4.5 ppm from the water but that the cellular system was exposed to such a concentration.

> "Q. When you say that fluorine affects fish, you are talking about the fluorine in the cells; is that correct?

Dr. Gale:

> "A. The fluorine made available to the cells, that is right, because the cell would not want to store fluorine, fluorine is a toxic substance, and is not there for a purpose in the fish, or in any organism." (R. 308)

The flow of the Meader water is 12,000 gallons per minute; (Exhibit 32) there was a good flow.

> "A. Oh, yes, there was plenty. My ponds have lots of fall from one to the other." (R. 536)

Witnesses testified as to great losses of fish in the raceways, where there is "lots of fall". The Appellees' theory is and, of course, had to be that fluoride from the air caused the damage, by falling directly into the water from the air and being washed into the water from the soil and vegetation near the

water. Certainly fluoride from Appellants' plants could not fall into the water unless borne over the water by air currents. The proof shows the wind blew in the direction of the Meader Hatchery from Appellants' plants not over a combined total for both operations of 17% of the time. The only other occasion that the smoke would hang over the water was during periods of "inversion". Mr. Overas, (R. 1107) says there is no record of this at all as to time.

The only other claimed source of fluoride contamination was from the washing of leaves or vegetation during rains.

We first discuss the expert testimony recognized by all parties as a necessity to lay the foundation for the proposition that fluoride in certain amounts was or is damaging to trout life.

At this point we assert there is no dispute among the experts on the proposition that fluoride did not, in fact, cause the damage or the loss claimed by the Appellees.

Giving to Dr. Gale all inferences to which his testimony is entitled, the fact remains that he stated positively he did not know whether the fish suffered by reason of their contact with fluoride; that he did not know what caused the loss and that he could not have ascertained that without an analysis or examination of the trout or trout eggs. Further, he was not asked for any opinion based upon the testimony of the Appellants' witnesses.

In addition, in evidence is Appellants' Exhibit 37, which had been and was in the possession of the Appellees and which was secured by them through their counsel from the Utah State Agricultural College, which exhibit definitely established the loss or damage was not, and could not have been, caused by fluoride.

The uncontradicted testimony of Dr. Wohlers and Dr. Wood also established fluoride was not the cause.

> "Q. In your investigation, Dr. Wohlers, did you ever or were you ever able to establish that fluoride was the reason for the trouble at the Meader Fish Hatchery?
>
> "A. I was not.
>
> "Q. What do you have to say as to that now, as to what you knew about it?
>
> "A. Well, as far as I know now, I am positive that fluorides have nothing to do whatever with the Meader problem." (R. 1009)
>
> "Q. In other words, what comes out of the plants, whether it be fluorides that are emitted and where they are emitted, the amount per 24-hour day, you don't feel would have much to do with the problem as to whether the Meader fish were being damaged by the fluorides?
>
> "A. That is correct, as long as they had the fluoride content of the water, which I did give them.

"Q. Your feeling is that the various samples which you took, which you said in all were how many?

"A. Thirty six.

"Q. Thirty six. You believe that these samples would give you a complete story of all of the data, day-after-day that the smoke and gas may or may not have been in and around the Meader property?

"A. That is correct.

"Q. That would be true without considering the phenomena of inversion where the air holds low to the ground, that would have no importance at all?

"A. It would have absolutely no importance, Mr. Racine." (R. 1044-1045)

Dr. Wohlers further testified that the particulate material from the Westvaco plant was insoluble, and showed conclusively, and without contradiction, that it could not affect the fluoride level of the water to raise it to a level that would be damaging to fish. Such emission from the plant as shown by the record, with relation to the possibility of contamination of the water, was absolutely insignificant. (R. 1013-1014) And the testimony of Dr. Wood:

"A. Yes, I have an opinion.

"Q. What is that opinion?

"A. I don't think that, under the conditions

described here, and as I was about to say, I heard the mortality described by Mr. Warren Meader before I left last week, I don't think under any conceivable stretch of the imagination could you have reached sufficient fluorine levels to produce the type of kill that was produced and described in this particular pond under these circumstances.

"Q. Why do you say that?

"A. In order to get a kill of this type, which would fit the circumstances described, it would require a fluorine level in the water of an absolute minimum of 500 parts per million with the range to 2,500 parts per million with the upper limits much more likely the condition necessary to cause a mortality over this short period of time by fluorine.

"Q. Now, let's assume that fluorine limits could be obtained out there, although the proof does not show it, and let's assume all of the other elements in the last question. I hope that I don't have to repeat all of those elements. Do you have an opinion as to whether or not fluorine toxicity could or could not be ruled out in that connection as accounting for a large mortality, or kill, as you have termed it?

"A. Yes.

"Q. What is that opinion?

"A. Even though the fluoride levels were

reached of say 2,500 parts per million and that these were responsible for the kill it could be ruled out as a factor in this mortality by analysis of the fish following the mortality. It has been shown that at levels of this extreme nature which are required for a sharp mortality of this type, that the fish absorb fluorides very rapidly and consequently the fluorine analysis following again a very acute mortality of this sort, would be very high, in the general range or maximum of 10 thousand parts per million, and no fluoride analysis has shown levels of this type here.

"Q. 10 thousand parts per million where?

"A. Of bone." (R. 1067-1068)

A number of fluorine analyses of fish and fish bone are in evidence, the samples having been taken by Dr. Greenwood, a recognized authority on the question of fluorides showing fluorine content far below any level resulting in damage to fish. (Exhibit 17)

Further, Dr. Wood heard the testimony of Warren Meader with reference to the mortality of the trout, (R. 1055, 1067) and at this point we think it it is very significant to call attention to a question asked Dr. Wood, and the objection of Appellees' counsel thereto:

"Q. The evidence has shown in this case that on occasion when certain ponds were raised or lowered that substantial mortality occurred and large kills occurred in the fish. Could you associate this with fluorine toxicity?

"Mr. Racine: If the Court please, we object to that question on the grounds that it is incompetent, and there are no facts upon which this witness could base any opinion because no information is given as to the vegetation analyses or the weed analyses surrounding these ponds where the water was raised and lowered.

"The Court: The objection will be sustained." (R. 1068-1069)

Now, Appellees, through Mr. Warren Meader, claimed as a significant point of proof that when he raised the level of water the fish swam into the weeds or vegetation on the sides of the banks of the ponds or runways, and that this had an amazing effect upon the fish. This evidence was given for the purpose of, and it was argued that such was the inference, that something from the plants or vegetation and weeds caused the damage to the fish. Yet note the objection, which was sustained, that those facts were not sufficient upon which an expert witness could base any opinion because there was no foundation given as to vegetation or weed analyses where the water was raised and lowered.

The Court, however, allowed the jury to speculate on this proposition. If an expert witness could not express an opinion as to the matter what was the observation or opinion of Mr. Meader worth?

The foregoing is typical of the position of Appellees who used only lay witnesses without expert

knowledge, unqualified to testify on causal connection.

The record is undisputed that Warren Meader called Dr. Wohlers to his hatchery in 1954 after a heavy loss of fish had occurred, and an analysis for fluorine was made of the leaves and of the fish and the information given to Meader. (R. 1010-1011) Thereafter, Appellees made no attempt whatever to establish by experts or laymen that the amount of fluoride shown by the analyses of the leaves or the fish was in any way damaging to fish or that it was even a possible cause of the loss claimed in that particular year.

The report by Dr. Ziegler directed to Appellees' counsel, (Exhibit 37) is conclusive proof by an expert of the plaintiffs' choosing that the fluoride content of the whole fish and the bone did not show the condition of fluorosis.

A painstaking and careful search of every available source known to Appellants has failed to produce any scientific data or authority, and none is in the record, supporting that flowing water can be contaminated by airborne effluents under conditions, even remotely, similar to the facts in the Meader case.

We have already shown that the Appellees' expert was not considering the effect of running water when he was testifying about the tolerable level of any and all cell life to fluoride. The report of Dr. Ziegler, Exhibit 37, had to do with experiments using aerated water in a tank, the water having been softened and containing soluble fluoride. The tests, and the amount

of soluble fluoride in still, soft water that would cause damage to trout is so far in excess of any water sampling in existence in the instant case that it seems simply incredible that inferences of lay witnesses can be permitted to achieve the result here obtained.

Any common sense appraisal or mathematic calculation not only disproves Appellees' attempt at a prima facie case but conclusively establishes that the damage suffered by the plaintiffs was not, and could not have been, the result of any fluoride contamination.

Exhibit 16 is a photograph of the Meader property. Only 1/16 of the area is covered by water. We submit the following example, predicted on the evidence in the record: If every pound of fluoride emitted from the plants in 1953, the year with the highest emission, could somehow be continuously funneled onto the portion of the Meader property shown in Exhibit 16, and if every pound of the fluoride was soluble and was retained on the property, it would raise the fluoride content of the Meader waters only 2.8 ppm. This is based on Exhibit 16, showing 1/16 of the Meader property area covered by water and is based on Exhibit 32 showing the Meader water flow rate to be 12,000 gallons per minute. The calculation is as follows:

6500 lbs F/day=4.5 lbs F/minute

12,000 gal/minute=100,000 lbs water/minute

$$\text{ppm F}=\frac{4.5 \times 1{,}000{,}000}{100{,}000} \times 1/16=2.8 \text{ ppm F}$$

As heretofore pointed out there is absolutely no way of determining the amount of time that smoke hung over the ponds by reason of inversion, and fluoride could only have gotten into the water directly from air currents including inversion. The wind could not have blown over the Meader property from both plants more than 17% of the time. Inversion occurs in the winter months, and if we allow six months of the year in which it could occur, it certainly would not occur all of the time, and would not occur when there was a wind, and it is inconceivable and impossible to apply to the above example the actual condition where the property was subjected to air current more than one-third of the whole time, and what will the result show? It shows conclusively that fluoride was not the problem.

Another illustration, a correct mathematic example and conclusion, shows that if it is assumed that Appellants' plant emissions were distributed and held within a two-mile radius of the plants (Appellees' Exhibits 1 through 9 definitely show the fluorides to be distributed over a much greater area), the Meader waters could have the fluoride content raised only 0.045 ppm. The proof of this is as follows:

$$\text{Area in 2 mile radius} = 8000 \text{ acres}$$

$$\text{Area of Meader water} = \frac{120}{16} = 8 \text{ acres}$$

$$\text{Ppm F in water} = \frac{8}{8000} \times \frac{4.5 \times 1{,}000{,}000}{100{,}000} = 0.045 \text{ ppm}$$

The only other source of contamination to the waters at the Meader Hatchery is claimed to be from runoff. Appellants secured from Appellees Dr. Greenwood's analyses of water and fish (Appellants' Exhibit 17; R. 512) which shows the water runoff in three places: above rat pen, 0.90 ppm; water runoff on top of hill, 0.52 ppm; Blackfoot pond, runoff northeast of hatchery by Douglas fence, 0.86 ppm. The date of this exhibit shows it was taken in the fall, September 29 and October 10, 1955. The samples were secured under Meader's direction and at the time in the fall when they wanted the analysis; Meader and his attorney then went to Utah State to see the experts. (R. 510-511)

Not once in the record in the Appellees' case is there any positive evidence linking the loss of fish and damage to eggs with an fluoride content of the hatchery waters.

Other than for the testimony of Appellees' Witness Gale, they have relied entirely to establish their case on lay testimony in which the witnesses merely surmise and speculate that emissions of fluorine caused the damage to the trout and trout eggs. The most positive testimony in the record from a lay witness is that of Phil Meader, and his is based entirely upon the fact that he had knowledge of fluorine emissions from the plant:

> "Had it made up that fluorine was causing the trouble * * *." (R. 573-574)

Appellees' Witness Gates testified in a manner typi-

cal of their witnesses when in response to a question as to whether or not he had any idea as to what caused the loss of fish he answered:

> "No, we just had a good idea it was fluorine." (R. 686)

In summary, Dr. Gale, Appellees' only expert witness who took the stand, established two points: 1) That living cells subjected to constant contact with a fluoride level of 3 ppm would have their enzyme system effected; and 2) that a trout subjected to a constant level of 4.5 ppm to 20 ppm of fluorine in soluble water would be adversely effected. With respect to Gale's testimony, there is absolutely no evidence that the cells of trout were subjected to 3 ppm of fluoride or that they were subjected to a constant level of fluoride in water of 4.5 ppm to 20 ppm of fluoride, either in running or still water.

As another conclusive argument that the Appellants' fluoride emissions had no connection whatever with the damage to Appellees' trout and trout eggs, we call the attention of the Court to the fact that the largest discharges of fluorides from the plants were in 1953 and 1954, the discharges being drastically reduced in 1955 and subsequent years. However, when we examine the evidence of Appellees we find that even though the aforesaid condition existed there was little, if any, change in the alleged loss of trout and trout eggs at the Meader Hatchery. Rather than set forth the detailed testimony of Appellees in this regard, we direct the attention of

the Court to pages in the record covering testimony that the trout and trout egg losses in 1953 and 1954 were identical to those in 1955 and 1956: Witness Nelson—R. 341; Warren Meader—R. 474, 477, 478; Witness Gates—R. 642, 675, 686, 688; May Meader—R. 746, 818, 817, 821-840. It is submitted that a reading of the aforesaid transcript references will conclusively illustrate the utter lack of relation between the Appellants' emissions of fluoride in pounds and the alleged loss in Appellees' hatchery.

UNIVERSITY OF IDAHO REPORTS

The technical staff of the University of Idaho was called into the field in the Pocatello area, starting in the spring of 1955 at the request of the citizens of the community, to make a complete fluorine survey and study for the entire area surrounding the plants of the two defendants.

We assume that the Court will accept the survey and the analyses of the State's University, which was cross-checked by Stanford Research Institute, the University being a completely disinterested party from a scientific standpoint, but interested in the welfare of the community.

The first report, that of 1955, is entitled "A Report of a Survey and Analysis for Fluorine Content of Plant Materials and Water Samples Taken in the Pocatello Area During the Summer of 1955." (Exhibit 25)

The second report, that for 1956, is "The Fluorine Content of Plant Materials and Water Samples Col-

lected in the Pocatello Area During the Summer of 1956." (Exhibit 26)

The third report from the University of Idaho is "Fluorine Studies in the Pocatello Area—1957." (Exhibit 27)

The Court will take notice that just the same emphasis was placed upon water as upon plant surveys, and the 1955 report shows, under Number 1, that the first analysis was of water.

The survey was conducted not only to give information concerning fluorine content of vegetation and water but of the atmosphere also.

We attach hereto as an Appendix that portion of the University of Idaho reports concerning water samplings. Exhibits 25, 26 and 27 refer respectively to the years 1955, 1956 and 1957.

With the University of Idaho in the field for the express purpose of making an adequate survey of the entire area for the protection of the public and to ascertain the contamination of vegetation, water and atmosphere by fluorine, Appellees, having introduced the reports, are bound thereby. The University determined and decided in 1955 that *in general the fluorine content of the water was low.* The reports show for each of the years 1955 and 1956 that the same number of samplings were made of the waters in the area for each year, and the samplings were made three times a year, the same as for vegetation.

In 1957 we find this statement:

> "Only a few water samples were analyzed for fluorine because the previous studies in 1955 and 1956 indicated the fluorine content of the waters in the area to be low. The results in Table 3 again show the low fluorine content of water, the only exception being the effluent water from the Simplot plant."

With regard to "effluent water," this was not in issue since it did not reach the Meader property or waters.

Taking for instance Appellees' Exhibit 8, which is one of Food Machinery & Chemical Corporation's reports, we find that the analyses for the first of February 1955, and for the first of March 1955, for the inlet and outlet at the Meader Hatchery, the first of February 1955 shows .5 ppm at the inlet and .6 ppm at the outlet, and for March 1955 .5 ppm at the inlet and .5 ppm at the outlet.

Remembering now that Appellents did not reduce the output of effluents until May of 1955, we find that in June of 1955 the sampling for the Meader waters by the University of Idaho, Exhibit No. 12, shows the first sampling to be .8 ppm, the second .3 ppm, and the third to be .7 ppm.

Again taking the analysis of the University of Idaho for the year 1956, over a year after the combined output of effluents was reduced to 790 pounds, we find the sampling on the Meader property to be as follows: first sampling, 1.1 ppm; second sampling, .8 ppm; third sampling, .5 ppm.

We find the sampling in 1957 to be .3 ppm. The

samplings of the University of Idaho are not only comparable with the samplings as shown by the testimony of Dr. Wohlers, and by the report for the year 1954, but in several instances show a greater parts per million, which rules out any question of the contamination of flowing water on the Meader property by fluoride.

Let us look also at Appellants' Exhibit 17 (R. 512). Dr. Greenwood's analyses of three water samplings at the Meader Hatchery show .90 ppm, .52 ppm and .86 ppm, made September 29, 1955, and October 10, 1955. Both the University of Idaho and Dr. Greenwood show in several instances a higher parts per million than the sampling in 1954, and they show a higher parts per million than the average for all the sample analyses for the year 1953. Also, they show a higher average than the 12 samples from one spring on the Meader property taken in 1953, where the unusual and unexplained sample of 4.7 ppm is reported. The average of the 12 samplings is .5 ppm.

Appellants' Exhibit 17 also shows the analysis of the four samplings of the fish by Dr. Greenwood, analyzed for fluoride content in 1955, both on a wet and dry basis, and showing a range on a dry basis of only 64 ppm to 150 ppm.

Concluding this phase of the argument, the record establishes the low fluorine content of the said water and vegetation in the vicinity of the Meader plant during the years in question. Scientifically, if as Ap-

pellees claim, airborne fluorides were transmitted to their waters, the quantity in the atmosphere necessary to reach the water, if the same were in soluble form, would have been so enormous as to adversely affect every living thing, including human beings, in the area. Such is just not the case, and we defy Appellees to show otherwise to this Court.

H. APPELLEES WHOLLY FAILED TO ESTABLISH THE APPELLANTS MAINTAINED A PRIVATE NUISANCE WITH RESPECT TO APPELLEES' TROUT AND TROUT EGG BUSINESS.

Appellees elected to sue Appellants in this case upon the theory that the latter were maintaining a private nuisance as to the former. The case is not grounded on any theory of negligence. The burden, therefore, is upon Appellees to establish that the plant operations conducted by Appellants constituted a private nuisance as to their hatchery operation. We submit that Appellees have in fact failed to establish that the plant operations constituted a nuisance under any authority or definition of such recognized in law. Reference is made to the authorities cited under this proposition.

The Supreme Court of Idaho has, however, on two occasions involving the operations of Appellant J. R. Simplot Company, in *McNichols v. J. R. Simplot Company*, 74 Idaho 321, 262 P. 2d 1012, and *Koseris v. J. R. Simplot Company*, _____Idaho_____, 352 P. 2d 235, determined the Appellants were and

are engaged in a lawful business, in an industrial area, and recognized by the Supreme Court as such. In the *McNichols* case, supra, the yardstick for determining whether or not a business is in fact a nuisance is set forth, and a reading of this case will disclose that the facts in the instant case fall far short of establishing a nuisance as to these Appellees. We note no claim for damages to Appellees has been made as a result of annoyance from the presence of dust, smoke or fumes from the plant or because of injuries to personal health. The only claim for damages rests in the loss of fish and damage to fish eggs, which as we have pointed out in earlier phases of this brief was not the result of, and could not have been attributable to, the emission of fluorides from Appellants' plants.

As stated in the *Koseris* case, supra:

> "The record amply indicates that the Simplot Company operation, involved in this proceeding, constitutes a lawful business which in nowise can be regarded as a nuisance per se. Rowe v. City of Pocatello, 70 Idaho 343, 218 P. 2d 695; White v. City of Twin Falls, 81 Idaho _____, 338 P. 2d 778; that if it is a nuisance it is per accidens, McNichols v. J. R. Simplot Co., 74 Idaho 321, 262 P. 2d 1012.
>
> * * *
>
> "Applying the theory of the Hansen case to the case at bar, any injunctive relief should not prohibit Simplot Company from conductiong its lawful business; nor prohibit the emission of

dust and fumes beyond the quantity that may be emitted upon reasonable control thereof by installation of up-to-date systems of control; nor beyond what is inherent in the industry when conducted consonant with modern methods."

Being established, therefore, the Appellants were conducting lawful businesses in a lawful manner, it was incumbent upon the Appellees to establish by a preponderance of the evidence that such operations resulted in a private nuisance to them, and this they have wholly failed to sustain. Further, the record shows that Appellants upon being apprised of a possible fluoride problem expended tremendous sums of money in constant improvement of their plants, cooperated with Appellees in all instances, offered assistance, and in the instance of Appellant Food Machinery & Chemical Corporation procured the services of Stanford Research Institute in trying to isolate and identify the problem, if one in fact existed.

I. THE ADMISSION BY THE TRIAL COURT OF CERTAIN DOCUMENTARY EVIDENCE OVER APPROPRIATE AND VALID OBJECTION OF APPELLANTS, AND THE REJECTION BY THE TRIAL COURT OF CERTAIN DOCUMENTARY EVIDENCE OFFERED BY APPELLANTS WAS HIGHLY PREJUDICIAL AND CONSTITUTED REVERSIBLE ERROR.

We submit the trial court erred in two respects in its rulings in connection with Appellees' Exhibits 1

of Appellant Food Machinery & Chemical Corporation dealing generally with the fluorine problem in the area. First, after the exhibits had been marked for identification and after they had been offered in evidence, the court without making a ruling with respect to admissibility permitted Appellees' attorney to cross-examine an executive of Appellant Food Machinery & Chemical Corporation with respect to the specific contents of said documents, this cross-examination being permitted over strenuous and valid objections from Appellants after counsel for Appellees had under the affirmative ruling of the court as aforesaid extracted from said exhibits the material information therefrom. The Court then, again over objection from Appellants, admitted Appellees' Exhibits 1 to 9, inclusive, in evidence. A reading of the record in this respect will disclose said exhibits contained a tremendous amount of immaterial, irrelevant and incompetent matter, opinions and conclusions of the maker of said reports, extremely prejudicial to Appellants. Further, with respect to Appellant J. R. Simplot Company, which company had no opportunity to cross-examine the authors of said reports, the mere admonition of the Court to the jury that such reports were not binding as to the J. R. Simplot Company did not in any way take the sting out of the receipt of this evidence.

We call the attention of the Court to the fact that counsel for Appellant Food Machinery & Chemical Corporation offered to stipulate all the material evidence from said Appellees' Exhibits 1 to 9 in evi-

dence. (R. 906-909). Such offer was rejected since it is obvious that Appellees desired not the material information from the reports but the prejudicial effect thereon with the jury, which, of course, would be emphasized by the admission over strenuous objection of counsel before the jury. The only basis upon which the introduction of said exhibits could be admissible would be on the question of punitive damages, but prior to the admission of said exhibits the Court stated:

> "As the record stands now, there is not going to be any question of punitive damage. When you get into the willfulness and the wantonness, that is out of the picture." (R. 857)

It is submitted that such conduct on the part of the trial court was highly prejudicial to these Appellants and resulted in reversible error.

We further believe that the court erred in admitting Appellees' Exhibit 22 in evidence for the reason that the same was not the best evidence, was a self-serving statement prepared in contemplation of litigation, and was not a business record as ruled by the trial court. The admission of this evidence was highly prejudicial since it dealt with the question of damage and was an element thereof improperly considered by the jury. We believe further the trial court erred in refusing to admit Appellants' Exhibit 35 in evidence since this was a document in the possession of Appellees and which had been given to Appellants by Appellees' counsel pursuant to Appel-

lants' discovery prior to the trial. This evidence contained the results of fluorine sampling taken by an expert in the employ of Appellees and showed no fluorine contamination, which obviously is the reason the admission of the document was objected to by Appellees who systematically and deliberately throughout the entire proceedings withheld material evidence developed by them, all of which negated the possibility of fluorine contamination.

Finally, we ask the Court to consider the trial court's refusal to admit Appellants' Exhibit 20. This was a copy of a letter from a Mr. Drew to Mr. Phil Meader and was offered for one purpose and one purpose only—that is, to impeach the testimony of Phil Meader. It was never offered as truth of the contents therefor, or for any information it contained, but solely to rebut Phil Meader's statement that he had not delivered such letter or a copy thereof to Dr. Wohlers. The court recognized it was offered for impeachment purposes only (R. 1018-1019), but reversed his prior ruling admitting the exhibit (R. 1018) and finally denied its admission. Phil Meader denied ever having given Wohlers the original of the letter or a copy (R. 620), but a proper foundation for receipt by the court of a true and correct copy was laid when Dr. Wohlers stated (R. 1016) that Meader had given to him either the original which he returned after he had made the copy, or Phil Meader had give him the actual copy. It is noted Phil Meader stated he had not ever received such a letter nor had he ever seen it. (R. 619-620) We believe in fairness

we were entitled to impeach Meader's credibility on this point and such impeachment could in fact in the jury's contemplation make all of his testimony suspect.

VII

CONCLUSION

We are convinced that the record in this case is wholly insufficient to justify a jury's verdict for Appellees. Absent any direct testimony or circumstantial proof that there existed a causal connection between Appellants' fluoride emissions and the mortality to Appellees' trout and trout eggs, the court erred in permitting the jury to surmise and conjecture on this basic requirement of a prima facie case for Appellees. In effect the trial court has permitted the jury to take the thinnest of lawsuits and by predicating inference on inference find the Appellants liable.

We submit that the court and jury ignored substantial material, uncontradicted evidence that overwhelmingly established that Appellants did not in the conduct of their plant operations maintain a nuisance toward these Appellees. We earnestly urge that this Court must, upon analysis of the record and the points herein urged, reverse this cause, giving judgments to Appellants without the necessity of a new trial.

Respectfully submitted,

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APPENDIX

From Exhibit 25:

This report covers the following:

1. Analysis of water and forage crop samples for fluorine content.

2. Plant disease surveys: one made by Dr. A. M. Finley during period July 18 to 20, and a second made by Dr. James Guthrie on September 16, 1955.

This report covers a survey made in the Pocatello area during the summer of 1955 to gain information concerning the fluorine content of crops and water supplies. Samples of water and various crops were taken at three different times during the summer of 1955. One sampling was made in June, a second in July, and a third the latter part of August and the first week in September. An attempt was made to correlate the sampling periods with the developmental stage of the crops. The area covered by this survey and the points in the area at which samples were taken are shown in the attached map.

Water samples were taken from various places in the area and analyzed for fluorine. The results are given in Table 2. The sample numbers correspond to the sampling points indicated on the map and a description of the sample is given in the appendix. In general, the fluorine content of the water was low. The only sample which showed an extremely high fluorine content was the sample Number 8 of effluent

water from the Simplot Company plant taken during the first sampling period. The plant was not operating on the second and third sampling dates.

Table 2—Amount of Fluorine Found in Water Samples from Pocatello Area

(Expressed in ppm)

	Sample Periods		
Sample Number	*First*	*Second*	*Third*
3*	0.0	.6	.4
4	.20	0.0	.5
5	.4	.3	.4
6	.6	.2	.9
9	.7	.4	.7
11	.7	.3	.8
12	.8	.3	.7
15	0.0	0.0	.2
1**	.2	.6	.4
2	.2	0.0	.5
7	2.8	2.7	1.2
8	245.0	7.7	6.0
10	12.3	.6	17.0
13	0.0	.2	.2
14	1.7	.5	4.2

*Samples 3, 4, 5, 6, 9, 11, 12 and 15 include well, spring, and canal waters.

**Samples 1, 2, 7, 8, 10, 13 and 14 are Portneuf River and plant effluent samples.

Water samples:

W- 1 Sample was taken from main current of Port-

neuf River at the bridge on the side road which branches southwest from Highway 91 about seven miles southeast from Pocatello city limits.

W- 2 Sample was taken from the main current of the Portneuf River just above bridge on Ross Park Road which branches southwest from Highway 91 about five miles southeast of Pocatello city limits.

W- 3 The sampling place was the Fort Hall main canal east of Highline Road and about .25 mile north of the Pocatello Creek Road-Highline Road junction.

W- 4 Sample was again taken from the Fort Hall main canal on east side of Highline Road and near the intersection of Highline Road and Chubbuck.

W- 5 This water sample was taken from the well on the Tyhee Ranch at the junction of Tyhee Road and Highway 91.

W- 6 Sample came from tap in Lindey's front yard which is on the north side of Highway 30N about .5 miles west of the Westvaco plant.

W- 7 Sample was taken from effluent stream midway between the Simplot and Westvaco plants. This is the effluent from Westvaco before it reaches Simplot.

W- 8 This sample was taken from the effluent stream after it crosses Highway 30N. This is

the effluent just after it leaves the Simplot plant.

W- 9 Sample was taken from cafe directly across the highway from Simplot plant. The water comes from a well which lies approximately 75 yards from the Simplot effluent stream.

W-10 Sample was taken from under bridge on Portneuf River downstream from where Simplot effluent enters river.

W-11 Sample was taken from the main stream of spring at Rowland's Dairy. Spring runs within 10-25 yards of the Portneuf River at this point.

W-12 The sampling place was the spring water near the main building by lower gate of fish hatchery on Meaders' place.

W-13 Sample was taken from the Portneuf River at bridge of Highway 30 about one mile upstream from the entrance of the Simplot effluent.

W-14 This sample was taken from the Portneuf River by rutty road leading over the bluff near west end of Reservation and Tyhee Roads.

W-15 This sample was taken from the tap in the county agent's office in Pocatello.

From Exhibit 26:

During the summer of 1956 a study was again conducted in the Pocatello area to gain information con-

cerning the fluorine content of vegetation, water supplies and the atmosphere. Samples of water and various crops were taken at three different times during the summer: the first sampling was made in June, the second in July, and the third in August. They are covered in this study and the points in the area at which samples were taken are shown in the attached map. The sample numbers correspond to the sampling points indicated on the map and a description of the samples is given in the appendix.

Table 2—Parts Per Million of Fluorine in Water Samples from Pocatello Area

		Sample Periods		
Sample Number	*Type*	*First*	*Second*	*Third*
W-1	river	0.4	0.8	0.5
W-2	river	0.5	0.6	0.3
W-3	river	5.8	0.9	1.0
W-4	river	0.4	0.7	0.3
W-5	effluent	238.0	y	y
W-6	effluent	65.0	1.9	5.0
W-7	effluent	1.5	1.4	1.3
W-8	well	0.8	1.0	0.8
W-9	irrigation	0.4	0.8	0.8
W-10	river	21.8	0.9	0.6
W-11	spring	x	1.6	1.0
W-12	spring	1.1	0.8	0.5

Water samples:

W- 1 Portneuf River, eight miles east of Pocatello.

W- 2 Portneuf River, three miles east of Pocatello where Ross Park Road crosses river.

W- 3 Portneuf River on flat west of the west end of Tyhee Road.

W- 4 Portneuf River at bridge on U.S. 30N one-fourth mile east of Simplot plant.

W- 5 Small canal, 1,000 feet east of Simplot entrance,, effluent water.

W- 6 Small canal, 500 feet east of Simplot entrance, effluent water.

W- 7 Westvaco effluent canal behind Simplot plant, effluent water.

W- 8 Frontier Cafe, across U.S. 30N from Simplot plant, well water.

W- 9 Canal at Highline and Chubbuck Roads, irrigation water.

W-10 Portneuf River at bridge at Chubbuck Road by Swanson Farm.

W-11 Rowland Dairy, three-fourths mile north of Simplot plant, spring water.

W-12 Fish Hatchery, one and one-eighths mile north northeast of Westvaco plant, spring water.

From Exhibit 27:

Only a few water samples were analyzed for fluorine because the previous studies in 1955 and 1956 indicated the fluorine content of the waters in the area to be low. The results in Table 3 again show the low fluorine content of water, the only exception being the effluent water from the Simplot plant.

Table 3—Fluorine Content of Water Samples Taken in Pocatello Area

Sample Number	*Description*	*PPM Fluorine*
W- 2	Portneuf River, three miles east of Pocatello	0.1
W- 3	Portneuf River, at west end of Tyhee	0.6
W- 6	Effluent from Simplot	8.2
W-10	Portneuf River at bridge at Chubbuck Road by Swanson Farm	1.7
W-12	Fish Hatchery-Pond	0.3
W-13		0.5

No. 17058 and No. 17059

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FOOD MACHINERY & CHEMICAL CORPORATION, a Corporation, operated as WESTVACO MINERAL PRODUCTS DIVISION,

and

J. R. SIMPLOT COMPANY, a Corporation,

Appellants,

vs.

W. S. MEADER and MAY MEADER, husband and wife,

Appellees.

Reply Brief of Appellees

Appeals from the United States District Court
for the District of Idaho, Eastern Division

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Attorneys For Appellees

GATEWAY PRINTERS—POCATELLO

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OPENING STATEMENT

Appellees instituted separate actions in nuisance against the Appellant, Food Machinery and Chemical Corporation, and the Appellant, J. R .Simplot Company. Those actions were consolidated for trial and at trial resulted in a jury verdict in favor of Appellees in case No. 17058 against Food Machinery and Chemical Corporation. The verdict of the jury and the judgment entered thereon was $57,295.80. The jury verdict and the judgment entered in case No. 17059 against J. R. Simplot Company was in the amount

of $4,246.41. The Complaints of Appellees against each of the Appellants charged the operation by the Appellants of a nuisance as to the Appellees during a period from on or about January 1, 1953, to on or about July 1, 1956, in emitting dangerous and poisonous gases and particulates from manufacturing plants operated by each of them which were carried to and deposited upon real property of the Appellees where they conducted a commercial fish hatchery; and that by reason of such emissions damages in an amount in excess of the judgments were suffered by the Appellees. The trial commenced April 13, 1959, and was concluded April 23, 1959. The evidence is voluminous, at times conflicting, but fairly supports the jury verdicts and the judgments entered on them.

STATEMENT OF FACTS

Appellees are in general agreement with Appellants' statement of the case insofar as it relates to the pleadings, but Appellees are unable to agree with Appellants' statement relating to the evidence.

In these appeals, with the exception of certain errors claimed by Appellants as to admission of evidence and as to giving of instructions, there is but one real issue, and that has to do with the sufficiency of the evidence to justify the verdict. In giving the statement of facts, Appellants have repeatedly made statements as to their view of what the evidenc shows, but not what it actually shows.

The Appellees, commencing sometime in 1915, for a

long period of years thereafter, operated a fish hatchery near Pocatello, Idaho, raising trout for sale commercially and developing brood stock for the taking of trout eggs and the resale of the eggs to a market developed over the years. R. 437-440. Food Machinery and Chemical Corporation commenced operations of its phosphorous plant in the latter part of the year 1949 and J. R. Simplot Company commenced operation of its plant and the manufacture of phosphate fertilizer and acids sometime during the year of 1944.

Each of the plants emitted fluoride in gaseous and particulate form and have continued to do so in greater or lesser amounts from the inception of their operation. The years involved in the law suit were 1953 to July of 1956. It is admitted in the answers of each of the Appellants and in the answers to interrogatories of each of Appellants, that such emissions occurred.

Fluorine is one of the most reactive and toxic elements known to science and is harmful to all types and kinds of life, including trout and trout eggs. R. 211, 239-326, 899-900. The Defendants' operations in the years involved admittedly resulted in large quantities of fluorine and fluorides being emitted into the atmosphere and being carried to lands surrounding the manufacturing plants, specifically including the properties of the Meaders within a radius of one to two miles of both manufacturing plants where the fish hatchery was located. R. 216-219, 238-241, 242-250, 1000, 1009-1010, 1025-1027, 1033-1038, Ex. 1-9.

The emissions from the plants of the Defendants were

both in particulate and gaseous form and were such that the winds did carry these effluents from the plants of the Appellants to the properties of the Appellees. Ex. 1-9, Ex. 41, R. 1099-1107, R. 595-601, 621-624, 655-656, 795, 811-813, 842-845.

Pronounced losses of fish and difficulty with eggs existed during the years involved in this suit and these losses were unusual and not within the experience of the Appellees who had operated this hatchery for almost forty years. R. 548-549, 683-692. Losses of fish were particularly observed at times following runoff of waters from melting snow, during rains, during falling of leaves from trees, during raising and lowering of the level of water around the ponds from the higher level reaching vegetation surrounding the ponds, and during times of low-hanging fumes and smoke from the Appellants' plants. R. 458-469, 494, 502-504, 506, 576-577, 685-690. The condition and appearance of the trout and the results of the egg hatch were unusual and not in the experience of experienced trout men. Various individuals, experts in operation of trout hatcheries by reason of their long experience in operating trout hatcheries, knew of no disease or condition in the trout recognizable to them and to others in the industry. So far as those hatchery men could and did testify, the operation at the Meaders was a good sound operation. R. 327-384, 469-477, 551-558, 671-708, 709-726, 744-746, 780-784, 801-842.

The record amply shows that the effects of fluorides and fluorine on trout and trout eggs may be described as

both chronic and acute. In the acute affects the trout may be killed in a relatively short period or in a longer period, but in the chronic condition resulting from the fluorides, the trout may have many results which are not normal, such as stunted growth, crippling effects, lack of fertility in the eggs. R. 259-327, 1031, 1090-1095.

The concentrations of fluorides on the Meader property showed as high as 300 ppm. on vegetation and showed up to 4.7 ppm. in water. Ex. 1-9 and Ex. 18. Concentrations in these amounts definitely would have their effect on the trout and trout eggs, according to Dr. Gale, who is the Dean of Pharmacy at Idaho State College and a recognized authority on toxicology, and whose testimony has been above referred to and appears in the record at pages 259 to 327. At page 325 of the record Dr. Gale stated directly that in excess of 3 ppm. fluoride would have an adverse effect on mature trout, whereas less than 3 ppm. would cause an abnormal growth and an adverse effect on younger trout. R. 325-326.

The results observed by the Appellees and by the various experienced hatchery men were completely consistent with the explained effects of fluorides on trout and trout eggs. The source of the fluorine was shown. The amounts reaching Appellees property was established. And the amount required to cause the observed effects in the trout and eggs being in conflict, the jury was entitled to accept the testimony of Dr. Gale rather than that of other witnesses.

The losses of the Appellees were established by financial

records, testimony of numerous witnesses, and by memoranda and data maintained during the period of the most serious losses. Ex. 15, 23, 22, R. 671-708, 729-796. The records as to the fish which died as the result of the fluoride, as well as the eggs, lost for sale as a result of the florides, coupled with the values on the market of eggs and of such fish, amply establishes damages fully justifying the amount awarded by the jury.

ARGUMENT

I.

IT IS NOT THE FUNCTION OF THIS HONORABLE COURT TO SEARCH THE TRIAL RECORD FOR CONFLICTING CIRCUMSTANTIAL EVIDENCE AND TO REVERSE THE JUDGMENT ENTERED ON A JURY VERDICT ON A THEORY THAT THE PROOF GIVES EQUAL SUPPORT TO INCONSISTENT AND UNCERTAIN INFERENCES.

The Appellants have, regardless of any assertion to the contrary, viewed the record most favorably to themselves. This is not the proper procedure in analyzing a record for purposes of an appeal. The Trial Court so stated in ruling upon the Motion for Judgment Notwithstanding the Verdict. The Order of the Trial Court appears at pages 87 and 88 in Volume I of the Food Machinery & Chemical Corporation record and at pages 65 and 66 of Volume I of the record in J. R. Simplot Company. There, the Court said:

". . . Although the evidence gives support to reasonable inferences and conclusions inconsistent with the jury verdicts, the Court cannot reweigh the evidence and set aside the verdicts merely because such inconsistencies exist or because it may or may not agree with the jury. There was and is sufficient evidence from which the jury could have drawn its inferences and conclusions that it did in rendering its verdicts, and by reason thereof the jury's verdicts cannot be set aside."

The rule in the Federal Courts, and, in fact, the almost universal rule is as stated by the Supreme Court of the United States in *Sentilles v. Inter-Caribbean Shipping Corp.*, 4 L. Ed. 2d 142, decided in the October Term, 1959. The Court said:

"It is not the function of a Court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. . . . The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. . . . Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other re-

sults are more reasonable."

Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29, 35;

Rogers v. Missouri Pacific R. Co., 352 U. S. 500.

The Supreme Court also directly referred to the necessity of expert testimony. On this question, the Supreme Court of the United States said:

> "The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, evident so shortly after the accident, was in fact caused by that accident, was not impaired by the failure of any medical witness to testify that it was in fact caused by that accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause. Neither can it be impaired by the lack of medical unanimity as to the respective likelihood of the potential causes of the aggravation or by the fact that other potential causes of the aggravation existed and were not conclusively negated by the proofs. . . . The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation. They were entitled to take all the circumstances, including the medical testimony into consideration. See *Sullivan v. Boston Elevated R. Co.*, 185 Mass. 602, 71 NE 90; *Miami Coal Co. v. Luce*, 76 Ind. App. 245, 131 NE 824. . . ."

In *Fegles Construction Co. v. McLaughlin Construction Co.*, CCA 9, 205 Fed. 637, this honorable Court said:

> "While the Plaintiff must show that the inferences favorable to him are more reasonable or probable than those against him, the circumstantial evidence in civil cases need not rise to that degree of certainty which will exclude every other reasonable conclusion. The rule itself is operative chiefly (52a) in the trial court and does not detract from the established principle that when a finding is attacked as being unsupported, the power of the Appellate court begins and ends with a determination as to whether, considering the whole record, there is substantial evidence which supports the trier of fact. Where two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

In the case just cited, this Court held directly that once facts are established, even though established by indirect or circumstantial evidence, it is the province of the trier of fact to deduce all inferences logically flowing from such proof. In the course of the opinion, this Court also cited *E. K. Wood Lumber Co. v. Anderson,* CCA 9, 81 Fed. 2d 161, in which this Court said:

> ". . . The favorite formula that a presumption may not be based on another presumption or an inference on another inference has often been used carelessly

and inaccurately with resultant confusion."

Appellants' Brief is devoted almost entirely to various assertions regarding fluorine and fluoride in the water at the Meader Hatchery being insufficient to cause fluorine damage to the trout and trout eggs. In reviewing the record as to this theory, the Appellants have chosen to cite and discuss those portions of the record most favorable to them and to disregard all of the facts and the circumstances of the entire case from which the jury could and did find against the position urged by Appellants. We do not believe it necessary to quote at length from the record, inasmuch as in our Statement of Facts, we have made reference to large portions of the record which fully support the facts upon which the Appellees rely. There can be no real argument from an examination of the record as to substantial evidence existing supporting the following:

1. Meaders' operation for a long number of years prior to the operation of the Appellants' plant was a profitable and sound operation.

2. The Appellants did in the years involved in the law suit emit large quantities of fluorine and fluoride into the atmosphere which settled in and about the lands surrounding the manufacturing plants and particularly upon the lands and waters at the Meader Hatchery; and that the Appellants knew fluorides and fluorine to be toxic and harmful to animal and plant life, but did not install controls until 1955.

3. The odor and the fumes were observed in and about

the Meader properties on many occasions and were traced to the plants of the Appellants.

4. Losses in the fish and trout eggs at the Appellees' hatchery were unusual, abnormal, and not within the experience of the Appellees and other qualified persons; no disease or other condition existed at the hatchery excepting the fluorine from Appellant's plants which would cause the losses.

5. The fluorine and the fluorides emitted from the plants of the Appellants reached the properties of the Appellees in amount sufficient to cause and did cause acute and chronic fluorosis as to the trout of the Appellees and the trout when analyzed showed larger fluorine content than trout from outside the area of contamination.

The reports of Defendants, Exhibits 1 to 9, abundantly show the existence of fluorine and fluorides around the Meader properties, with samples of vegetation showing up to 300 ppm. Water samples showed up to 4.7 ppm. in the running water. The water samples were not taken at times when the fumes, gases, and particulate matters were heaviest around the Meader properties. The atmospheric phenomena of inversion frequently existed around Meaders and at such times fumes, gases and odors were most noticeable. Inversion most usually existed in the early morning or late evening hours. No samples were taken at these times.

Dr. Gale, a recognized toxicologist, positively stated that at 3 ppm. of fluorine any cellular life is in a danger zone. R. 266-267:

"A. The body has a defense mechanism to protect itself against some excess quantities, and 2 parts per million, it appears that the body could handle that, it appears from all evidence. As soon as you get around that area, your kidneys and the cells can't seem to rid themselves of that excess of fluorine.

Q. So that when you are over 3 parts per million, you are in a danger zone?

A. Yes, sir."

Then, at Page 267 of the Record, Dr. Gale testified, as follows:

"Q. Is there any difference, to your knowledge, between the effect of fluoride on animal life on the surface and living and breathing in the atmosphere as against fish life which is living in water and taking oxygen from water?

A. Basically, no. Because the food ingestion and the air breathed—

Q. They are going to have a similar effect?

A. Yes."

At Page 270 of the record, Dr. Gale testified:

"Q. Well, what I mean, the amounts that would totally block the enzyme system. You testified any-

thing over 3 parts per million would have its effect.

A. Well, we have chronic toxicity studies on humans. At certain levels we have situations of the problem developing where we have respiratory complications from fluorine, but many of these go unrecognized until it's a chronic situation after breathing lots and lots of it. Years ago we didn't recognize how potent fluorine was, and many chemists were exposed to some of the gaseous fluorines. About the only thing available to them when we have a case of fluorine poisoning is complete bed rest for four to six months, I believe.

Q. That is humans?

A. Yes, a chronic situation.

Q. Would you just tell us what the fact is, Doctor?

A. If you have a concentration of fluorine available to the cell, to cells—millions of cells—available to block them, then the body is not going to function to its normal capacity.

Q. Would it be immediately lethal?

A. You could have all gradations of total inactivity. It would not be immediately lethal."

Appellants, as to the tests which showed up to 4.7 ppm.

of fluorides in the ponds and springs at the Meader Hatchery, say that those tests are suspect and, therefore, should not be considered at all. Nevertheless, the tests were taken by them and there is a great deal of evidence of much larger concentration of fluorine in vegetation. It is the position of Appellees that the jury was entitled to consider the water testing and the vegetation testing in relation to all of the other circumstances and that such evidence was substantial and did justify the finding of the jury that the fluorine emissions from the Defendant plants did cause the damage to Appellees in loss of trout and trout eggs and did constitute a nuisance. It is the further position that the record positively shows the adverse effect which fluorine and fluorides in the amounts shown in water and plant life on the Meader property will have ~~on trout and trout plant life on the Meader property will have~~ on trout and trout eggs; that the Meader Trout, upon analysis (Ex. 18) were found to have had in the viscera, as opposed to the bone, 14 to 77 ppm fluorine, far exceeding the 2 ppm fluorine found in trout at Crystal Springs Hatchery, which is a hatchery outside the industrial pollution area. This is of importance because Dr. Gale many times said over 3 ppm. reaching cells would cause the results observed in Meader's fish.

Dr. Gale did testify that fish would be affected in water with a content of from .2 ppm. to 1 ppm. of fluoride. R. 287. That a small amount of fluorine in the bone is normal, R. 287, but if fluorine is in the tissues and viscera he would be worried about it. At page 308 of the record, Dr. Gale said:

"A. I think I shall refer to a statement I made yesterday; once an organism absorbs fluorine, if it is a mature organism with well formed bones, it will be able to detoxify and its kidney will be able to excrete and adequately protect it up to 3 parts per million, but in a range from 4.5 to 20 parts per million, as much as 30 to 60 per cent of the material will be retained in the organism.

A. . . . In the young fish, without bones, then the excess fluorine causes excess bone development and calcification of ligaments, and of cartilage. If you don't have the bone structure as a decalcifying mechanism, then you have got a problem—young immature adults have the same situation—I mean immature humans."

At page 315-316 of the Record, Dr. Gale said:

"A. The older trout has, if he has not already built up a high concentration from living in the environment in the area, if he has not filled his toxicity storehouse, so to speak, from living in the environment that Mr. Davis indicated yesterday, he will be able to detoxify more fluorine than a young fish, over a period of time.

Q. And he would not be damaged as a result?

A. He would be affected as a result, yes, sir.

Q. Well, now, damaged?

A. Well, you place me in a position again to stating whether a heart or a brain is more important to the function of the organism. The trout would not have his metabolism—his metabolism would be effected, it would be different than Mother Nature created him to be.

Q. And it could not, without going into the skeletal structure, detoxify that amount of fluorine without injury?

A. No sir, he could only handle about 3 ppm. and any excess—anything retained will cause chemical combinations with enzymes and will inhibit some of them."

Appellants have attempted to emphasize the testimony of Drs. Wohler and Wood. As we view the matter, this amounts to nothing more than an attempt to weigh the evidence and to arrive at a conclusion which is contrary to the conclusion reached by the jury. The question is not what the Appellants believe the evidence shows, but is whether or not the jury from the evidence could reasonably determine the matter as the jury did determine it. Dr. Wohlers said he was a chemist. He is not a toxicologist, nor is he a fish pathologist. Dr. Wohlers did not examine the Meader trout and make any informed conclusion from expert examination of the cells and tissue of the Meader trout. Actually, Dr. Wohlers

was nothing more than a coordinator of the investigation made for Stanford Research Institute as to the fluorine problem surrounding the plant of Food Machinery Corporation. This study was made in behalf of Food Machinery and for the study Stanford Research Institute was paid. Dr. Wohlers simply testified that in his opinion fluorine reaching Meaders was not sufficient to cause the claimed damage. Opposed to such conclusion of Dr. Wohlers is the positive testimony of the fluoride content of the water and the vegetation sampling showing up to 300 ppm. in the immediate vicinity of the Meader ponds. Dr. Gale, as has been demonstrated, testified that over 3 ppm. of fluorides reaching cellular life would cause damage to life, including trout, and would effect the fertility.

Dr. Wood attempted to testify in behalf of the Appellants. Dr. Wood never saw the trout at the Meader Hatchery during the years involved. He first saw the hatchery and any trout or eggs from it in March of 1959. R.1079. This was three years later than the latest date for which damages were claimed. He never performed any autopsy at all on the trout and simply attempted to give his opinion based upon some of the facts in the record. As a matter of fact, Dr. Wood wasn't even present throughout the trial. R. 1063-1064. Dr. Wood's opinion was not required to be accepted by the jury. In any event, Dr. Wood's testimony was apparently rejected by the jury and the testimony of Dr. Gale, together with all of the intendments and inferences derived from the circumstances accepted by the jury in concluding that Appellants had damaged the Appellees.

II.

INFERENCES MADE FROM PROBATIVE FACTS DO NOT CONSTITUTE LEGAL SPECULATIONS, IF THE INFERENCES ARE PROBABILITIES BY TEST OF COMMON JUDGMENT, AND SPECULATION IS NOT INVOLVED MERELY BECAUSE A CHOICE OF INFERENCES IS POSSIBLE FROM THE PROBATIVE FACTS.

In *National Lead Co. v. Shuft*, CCA8, 176 Fed. 2d 610, the Court said that inferences made from probative facts do not constitute legal speculations, if inferences are probabilities by test of common judgment. Furthermore, the Court there said that speculation is not involved merely because a choice of inferences is possible from the probative facts. That case also stands for the rule that a theory of proximate cause resting in probative circumstances does not become a matter of speculation and conjecture by mere suggestion of other possible causes which are unsupported by any proved facts.

In *Doctor's Hospital, Inc. v. Badgley*, 156 Fed 2d 569, the Court said:

> " . . . Probable causes may be inferred from apparent effects, despite the possibility of error, that inheres in all human observation and all human inferences. What looks like a man's signature may be found to have been written by him, though no one saw him write it and though it may actually be, as he claims, a forgery. Nothing is ever certain and in civil actions nothing

has to be proved beyond a reasonable doubt."

Many cases have held that probable causes may be inferred from apparent effects, despite the possibility of error that inheres in all human observations and all human inferences.

In *Newberry v. Crandell,* CCA 9, 171 Fed. 2d 281, the Court was concerned with the question of whether or not causation might be proved by circumstantial evidence. In that case the Court determined that the doctrine of res ipsa loquitur could be applicable to prove causation and that necessarily reliance must be placed upon circumstantial evidence. Again, in *Bratt v. Western Air Lines,* CCA 10, 155 Fed 2d 850, the Court in an airplane accident case where no direct proof was available, determined that circumstantial evidence, whether or not from an expert, could be used in determining the ultimate fact of causation.

In *Wardrop v. City of Manhattan Beach,* Calif., 326 P. 2d,15, the Court was concerned with the causal connection between the pumping onto Plaintiff's land of sump water and a polio virus with which a child became infected. The Defendant contended that the child could have contacted the virus from many sources other than the sump water, but the Court held that the jury could reasonably conclude the source of infection was from sump water rather than from another source, and that the Plaintiffs were not required to establish positively that the child's infection came from the sump water, because such would be an impossibility.

In Appellants' Brief, pages 40 to 46, an attempt is made

to disregard the effect of Dr. Gale's testimony as to toxic effects of 3 ppm. fluorine on trout and trout eggs, as well as all of the evidence bearing on the emissions from the plants of Appellants being carried to the lands of the Appellees. This is done by simply saying that Dr. Gale did not testify that any damage resulted to the trout and eggs of the Meaders, and since Dr. Gale did not see the trout and the eggs, all his testimony as to the effects of fluorine is to be disregarded, even though all of the other circumstances of the case directly and reasonably point to the condition of the trout and the eggs being the result of the emissions from the factories of the Appellants. To do this, Appellants must, as they do throughout their Brief, view the evidence in a light more favorable to them and with indifference to evidence in the record contrary to the position asserted by them.

The cases cited by Appellants' in Section B of their Brief do not support the position taken by them. 20*Am. Jur., Evidence, Section* 1189, is cited under this point at page 23 of Appellants' Brief. However, the text states that circumstantial evidence need not exclude every other cause and may so contradict positive testimony as to warrant the jury in disregarding positive testimony. 32 CJS, *Evidence, Section* 1039, states that any well connected train of circumstances is as cogent of the existence of fact as any direct evidence and may outweigh opposing direct testimony. Appellants, in any event, assume testimony given by their witnesses was direct and positive, which the record shows it was not. Both Dr. Woods and Dr. Wohlers were giving their opinion based upon their own surmise and conjecture. Dr. Wohlers, by his own admission was

not an expert in toxicology. R. 1023. A similar criticism may be made as to the other authorities cited by Appellants. That is, those cases are not in any manner comparable to the facts of this case and any abstract statements contained in them, as applied to this case, are of no value.

The record in this case shows a positive source of fluorides emitted from the factories of the Appellants, shows the results caused by such fluorides as applied to the trout and trout eggs, and the trout and trout eggs of the Appellees were damaged in accordance with the very effects which Dr. Gale described as resulting from amounts lower than actually found on the premises of the Appellees.

In *Kyle vs. Swift & Co.* 4CCA, 229 F. 2d 887, a food poisoning case, where the trial court directed a verdict on the basis that the Plaintiff relying on circumstantial evidence must exclude every reasonable explanation but that of responsiblity of Defendant, the Circuit Court reversed the Trial Court, stating:

> "The rule stated by the learned Trial Judge is the rule to be applied by the jury in a criminal case based upon circumstantial evidence, where guilt must be established beyond a reasonable doubt. It is well settled that for such purpose the evidence must be viewed in the light most favorable to the Plaintiff and every inference favorable to Plaintiff which can reasonably be drawn therefrom must be drawn. As said in *Wilkerson v. McCarthy,* 336 US 53, 57, 69 S. Ct. 413, 415, 93 L. ED 497: 'It is the established rule that

> in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given.' And it is not enough to justify direction of a verdict for Defendant that conflicting inferences can be drawn from the testimony, as it is the function of the jury and not the judge to say what inferences are to be drawn."

In *Spalter v. Four-Wheel Brake Service Co.*, Calif., 222 P. 2d 307, at page 310, the Court said:

> "It must not be forgotten that in civil cases the law does not require absolute demonstration but only reasonable probability to support the jury finding. . . . . in order to support an inference based on circumstantial evidence it is not incumbent upon the Plaintiff to exclude the possibility of every other reasonable inference from the proved facts. . . . "

The rule that the trier of the fact has the right to determine the reasonable inferences from proved fact, whether the facts proven be circumstantial or direct, is in no way altered simply because the ultimate issue of whether or not the trout had been poisoned by fluorine was subject to different views. Dr. Wood, who never saw the hatchery or the trout and eggs in the critical years involved, testified that in those years a fish pathologist did not exist who could determine by autopsy the actual cause of death or condition of the trout. Such an individual as a fish pathologist just did

not exist. R. 1090. But, the fact is that Exhibit 18 shows that the viscera in the Meader trout analyzed during the years covered by the law suit did contain 14 to 77 ppm. fluorine; and Dr. Gale testified positively that 3 ppm. reaching the cells would cause the damage as described by him. Thus, it is a fact established by the record that the Meader trout did in fact suffer from fluorosis, and direct positive testimony of this fact does exist contrary to any assertion made by Appellants.

III.

THE ULTIMATE WEIGHT TO BE GIVEN TESTIMONY OF EXPERTS IS A QUESTION TO BE DETERMINED BY THE JURY; AND THERE IS NO RULE OF LAW REQUIRING THE JURY TO SURRENDER THEIR JUDGMENT OR TO GIVE A CONTROLLING INFLUENCE TO THE OPINION OF SCIENTIFIC WITNESSES.

The Supreme Court of the United States has commented on the function of a Court in examining the determination of a jury; and, of course, this Honorable Court has had the occasion to examine its function as well as the function of the Trial Court in reviewing a determination by a jury in a broad number of cases, involving many factual situations. Each such case rests upon its own peculiar facts and the record as developed in the Trial Court. The function and review is in no manner changed merely because the cause being reviewed involves a medical or expert issue. *Sentilles*

v. Inter-Carribbean Shipping Corp., 4 L. Ed 2d states the applicable rule. Prior to the decision in Sentilles, the United States Supreme Court in *The Conqueror,* 166 U. S. 110, 41 L. Ed. 937, at page 947 of the Law Edition, said:

> "In short, as stated by a recent writer upon expert testimony, the ultimate weight to be given to the testimony of experts is a question to be determined by the jury; and there is no rule of law which requires them to surrender their judgment or to give a controlling influence to the opinion of scientific witnesses."

The Idaho Supreme Court has held directly that the weight and credibility of the evidence of an expert witness is to be judged solely by the jury and such weight and credence will be given to it by the jury as the jury thinks the expert's testimony is entitled to. If the expert's testimony runs counter to the convictions of the jury as to the truth of the matter, the jury in the exercise of its judgment may disregard the particular expert's testimony. *Carscallen vs. Coeur d'Alene and St. Joe Transportation Co.*, 15 Ida. 444, 98 P. 622.

In any event, the argument of the Appellants that Appellees had no expert testimony is not the fact. Dr. Gale positively testified as to the effects of fluorine and fluoride on trout and trout eggs. His testimony was positive that an amount of 3 ppm. fluorine would cause the precise results which were observed as to the trout and trout eggs of Appellees. This testimony was not couched in obscure, ambig-

uous language, such as "might" or "possibly". Frequently, Courts have dealt in semantics in reviewing expert testimony, but there would appear to be no such criticism to be made of Dr. Gale's testimony in this case. The testimony of Dr. Wood and of Dr. Wohlers, offered by the Appellants, is of no greater value whatever than the testimony of Dr. Gale. Simply because the Appellants prefer to believe the opinions of their witnesses over the opinions of others does not detract in the least from existence of substantial evidence from which the jury had every right to determine the issue of causation and of liability in favor of the Appellees.

Michalis v. Cleveland Tankers, Inc. — US —, 5 L. Ed 2d 20, 29 Law Weekly 4001, recently decided by the Supreme Court of the United States in an action involving a seaman who claimed a casual connection between trauma and aggravation of Berger's Disease resulting in various amputations, cited the *Sentilles* case, 361 U. S. 107, for the proposition that because there is a difference of opinion as to causal connection does not mean that a question for the jury is not presented. In that case, both the Trial Court and the Appellate Court had found the evidence did not present a jury question but the Supreme Court reversed and remanded for trial. As to whether the wrench which struck the Plaintiff was a reasonably suitable appliance, the Court stated, page — of the Law Edition report:

> ". . . We think both Courts erred. True, there was no direct evidenc of play in the jaw of the wrench, as in *Jacob vs. New York City,* 315 U. S. 752, 754,

> but direct evidence of a fact is not required. Circumstantial evidence is not only sufficient but may also be more certain, saitsfying and precise than direct evidence. *Rogers v. Missouri-Pacific Railroad Co.*, 352 U. S. 500, 508. . . ."

The Court then went on to say that the jury, on the record, with the inferences permissible from the testimony would have been fully justified in finding for the Plaintiff; and that it does not matter that from the evidence the jury may also with reason, on grounds of probability, attribute the result to other causes.

At pages 28 to 40 of Appellants' Brief, Appellants attempt to develop the point that the Appelles failed to carry the burden of establishing by the testimony of experts or other scientific proof that the fish and trout eggs were damaged by the fluorine from the factories of Appellants. Appellants argue that there is a total absence of proof of cause and effect and that, as a result, the judgment can be based only upon guess, conjecture, and surmise. Many cases are cited. Again, the comment earlier made in this Brief is fully applicable; that is, that each case necessarily must stand upon its own facts and abstract principles of law may in a given situation be fully applicable and in another factual situation have no value.

As an example, the Appellants throughout the litigation in this case have cited the *Splinter* case, 74 Ida. 1, 256 P. 2d 215. The Trial Court did not believe this Idaho case to be

applicable for the reason that before that case can be applicable it would require the Court to say that the source of fluorine and the amount of fluorine deposited on and about the Meader properties insofar as the effect of fluorine on trout and trout eggs are wholly speculation and conjecture. It would also require the Court to say that the evidence as to the symptoms of the Meader trout and eggs and their being consistent with and identical to the results caused by fluorine was of no importance and conjectural. Also, it would require that the Court give no effect to the existence of fluorine and fluorides in excess of an amount which Dr. Gale said would cause the results as found in the trout and trout eggs. Appellants are not entitled to have these facts forgotten and overlooked. They are not entitled to have the testimony of Dr. Gale rejected and the testimony they desire to believe accepted for purposes of reversal.

IV.

NO PREJUDICIAL ERROR WAS COMMITTED BY THE COURT IN ADMISSIONS OF EVIDENCE OR IN RULINGS ON EVIDENCE OR IN THE GIVING OF INSTRUCTIONS; AND THE APPELLANTS WERE NOT PREJUDICED IN THE CONDUCT OF THE TRIAL IN ANY MANNER AS TO AUTHORIZE REVERSAL ON THIS APPEAL.

Under heading "C", Pages 46 to 50 of Appellants' Brief, complaint is made of failure of Appellees to call certain witnesses whose testimony Appellants apparently feel

would have been helpful to Appellants. The argument is made that these witnesses, since they were not called by the Appellees, necessarily would have given testimony adverse to the Appellees and that, therefore, the Appellants are entitled to some sort of a presumption. The fact is, of course, that these witnesses were equally available to Appellants. Appellants knew the trial dates and had every opportunity, if they desired, to obtain the testimony of these witnesses. In fact, Appellants introduced Exhibit 17 which was an analysis made by Dr. Greenwood, one of the witnesses whom Appellants insisted should have been called by Appellees.

At the conclusion of the trial, Appellants made no request to the Trial Court for an instruction related to any such presumption, and made no objections as to this point with regard to any instructions actually given by the Court. The record as to the objections made to the instructions appears at page 1125 of the record.

It is elementary that to justify a reversal on appeal the Appellants must show in what manner they were prejudiced by any claimed errors. No attempt is made to show as to this particular matter that prejudicial error was committed. The Appellants lay no foundation which would justify this objection. The circumstances concerning the availability of Dr. Greenwood and Dr. Ziegler, who were not residents of Idaho and who were not subject to subponea in Idaho, was not caused to be placed in the record by the Appellants. The situation with respect to Dr. Leonard is not shown by the record. His physical condition, the basis upon which he may

have made certain tests, the validity, and his ability to take those tests are matters which Appellants had a duty to make apparent in the record if they are to rely on any such objection as now made. The record as to the complaint now made by Appellants with respect to Dr. Leonard appears at pages 987 to 991. No suppression of evidence exists. If the Appellants intended to offer Exhibit 35, they had the duty to see that Dr. Leonard was there to explain the exhibit. This they did not do and any inference is against Appellants for their failure in this regard.

We most respectfully urge that this portion of Appellants' argument is without any substance or merit whatsoever. Likewise, the same may be said of Appellants' criticism with respect to Dr. Greenwood and Dr. Ziegler, as well as Dr. Wiese. If there is any matter which the Appellants believed should have been brought to the attention of the Court and jury through any of these persons, they had every opportunity to call them and it was incumbent upon Appellants to do so.

Under Section "D" of Appellants' Brief, pages 50 to 55, it is urged that the Court committed reversible error in not instructing that a reasonable amount for the salaries of Appellees should be deducted from net profits in assessing damages. The fact is that the Appellees had the expense connected with the operation of the hatchery and did not take any salaries at all. Consequently, no deduciton could properly be taken under the facts as established. The Meaders did work and were required in fact, to work more than would have been necessary had not the damage or losses been caused by

the Appellants. The cases cited by them are those where performance under a contract is rendered impossible and, as a consequence, no work has been done by the claimant, but he, nevertheless, includes in his claim for damages a reasonable amount for salaries. In such event, the cases hold that a reasonable salary deduction is proper. Here the Meaders took no money from the operation of the business as salaries or wages. These people had no income except from net profit of the hatchery and had no other employment and nothing was charged to expense of the hatchery for their services. R. 775-777, 796.

Specifications of error VI, VII, and VIII have to do with instructions requested but not given. These specifications are apparently covered in the Brief of Appellants under heading "E", pages 53-55, heading "F", pages 55-56, "G", pages 56-75, and "H", pages 75-77.

Requested instruction 8 is set forth at page 16 of Appellant's Brief. The instructions as actually given by the Court are contained at pages 1110-1125 of the record. At pages 1116 and 1117 the Court instructed the jury in accordance with the provisions of Section 52-101 of the Idaho Code, defining a nuisance. The Court also instructed as to the reasonablness of the use of Appellants' property and as to whether or not the use was such as to be reasonable as to the Plaintiffs. A perusal of all of the instructions as given by the Court shows that the jury was instructed properly as to the law and that the Appellants were in no manner prejudiced by the instructions. No case is cited which supports such an

instruction as contained in Appellants' requested instruction No. 8, when the instructions actually given by the Court are considered as a whole.

Appellants' requested instruction No. 31 is set forth under Specification of Error VII, pages 16-17 of their Brief. The requested instruction was a so-called pinpoint instruction, attempting to emphasize specific portions of the evidence. The Court did instruct the jury, R. 1118, as to the burden of proof upon the Appellees. The Court stated:

> "Plaintiffs must prove that some act or activity on the part of the Defendants, or either of them, caused damage to the Plaintiffs' fish and fish eggs. Proof in this connection must establish causal connection between the acts or activity of Defendants and the damage to the Plaintiffs beyond the point of conjecture or surmise. It must show more than a possibility of damages from the Defendants' acts or conduct."

The Court then went on to advise the jury that in considering causal connection they could consider all the facts and circumstances found to have been proven by the evidence; and that the fact that fish died and there was an egg loss in and of itself would not establish liability, but that by a preponderance of evidence the jury must find that dangerous and toxic substances from the plants of Defendants, one or both, settled in, upon, or were carried into contact with fish and fish eggs in the Plaintiffs' hatchery in a sufficient amount to

harm fish and fish eggs. These, and the other instructions given, certainly covered the applicable law and in no manner prejudiced Appellants.

Appellants at pages 55 and 56 of their Brief make some reference to Appellees contending that a presumption existed in their favor. A perusal of the instructions of the Court will not disclose the giving of any instructions as to presumptions and at no time have the Appllees, throughout this litigation, argued as to any presumption, except as shown by the evidence from all of the facts and circumstances introduced in evidence. Appellants in these pages of their brief make the flat statement that Dr. Wohlers and Dr. Wood disproved Appellees' claim of fluoride damage, and, thus, the burden was on the Plaintiffs to contradict the proof of Dr. Wohlers and Dr. Wood. Appellants also make certain other statements as to what their evidence showed, which they apparently felt overcame any evidence introduced by the Appellees. At most, there was only a conflict and the jury resolved that conflict in favor of the Appelles and against the Appellants.

Appellants' witnesses never explained their own analysis of Meader trout as compared to trout outside the contamination area, where the Meader trout showed in the viscera and tissues 14 to 77 ppm. fluorine and the other trout showed but 2 ppm. fluorine in the viscera and tissue. Also, Dr. Wohlers in considering the problem of the leaves in September 1954 admitted under cross-examination that the samples of the leaves were never tested in the unwashed state. R. 1038. Likewise, Dr. Wohlers, again under cross-examination,

admitted that as to sample point No. 25, shown on page 20 of Exhibit 4, which was a sample of vegetation taken from the Martin place, which is near the Meader properties but actually a greater distance north from the manufacturing plants of Appellants, showed 300 ppm. in the unwashed state, but when analyzed in the washed state analyzed only 108 ppm. R. 1034-1036. Dr. Wohlers admitted that the washings represented soluble fluorides and the washed sample contained the fluorine material still inside the leaf. The washings would be the fluorides on the external part of the leaf. In other words, 192 ppm. of fluorides were soluble and were on the leaf in the unwashed state which do not reflect in values used by the appellants. These fluorides were in no manner considered by Dr. Wohlers in any of his calculations or conclusions. R 1037-1039. Furthermore, Dr. Wohlers is not a meteorologist, personally knew nothing about the winds except by reason of studies he had made for him. R. 1040. It is also of some importance in evaluating Dr. Wohlers' testimony that he was never present during the winter months, that he did not even come to Pocatello and become in any manner associated with the problem until the spring of 1954, that he then did not stay, that he never was at the Meader Hatchery during the hatch of eggs, and that he only took 36 samples of water, most of which were taken in 1955, 1956, and subsequent years. The record is absolutely clear that the heaviest concentration of the fluorine emissions from the plants of the Appellants were in the years 1953 and 1954. In taking the tests, no importance at all was attached to taking the tests at the times when heavy fumes and smoke from

Appellants' plants were settling over the ponds and realty of the Meaders; nor was any importance attached to the phenomena of inversion, existent during the winter months when the air is heavy and holds all fumes and smoke close to the surface of the ground for protracted periods.

Contrary to the flat statement of Appellants that the shale was not changed in the manufacturing process, is the testimony of their witness, Kass, and Dr. Wohlers. Kass testified that hydrogen fluoride and silica tetra fluoride are emitted from the shale during the manufacturing process. R. 189. Hydrogen fluoride is very toxic. R. 261, 1028. In 1950 Food Machinery in one of its own company reports, made by Kass, himself, stated: "The fluorine contamination in the area surrounding the Westvaco Plant is very serious". R 200-202. Hydrogen fluoride and silica tetra fluoride are soluble in water and very reactive to water. R. 239, 294-295. Dr. Gale testified that because of its toxicity hydrogen fluoride is difficult to work with. R. 261. Of course, the importance of all of this is that Appellants are attempting to convince this Court that the emissions from the plants were not soluble and, consequently the fluoride ion could not damage the trout in the ponds of Meaders. Dr. Gale also stated that a fish would swallow water every time it opened its mouth and the fluorine would go into its stomach and that fluorine would also go in through the gills. R. 296. Even the insoluble fluoride ions from the fluorapitite particle would be acted upon by hydrochloric acid or any other digestive enzyme and would free fluorine. R. 303-306. Dr. Gale testified directly that small amounts of fluorine would produce effects not normal, such

as limiting its fertility. This applies to fish as well as all animal life. This would not according to Dr. Gale be visible by the typical knife or microscope method of analysis. R. 303.

Under the portion of the Brief designated "G", Appellants consider the testimony of Dr. Gale as against the testimony of Dr. Wohlers and Dr. Wood. That discussion amounts to nothing more than argument as to the appellants' analysis of all of the facts and circumstances of the case as presented to the jury and which argument was rejected by the jury. The entire argument is predicated upon the validity of opinions advanced by Dr. Wohlers and opinions advanced by Dr. Wood and by disregarding any evidence against the Appellants contrary to the position which they claim the evidence shows.

In this portion of their Brief, Appellants insist that there is a complete lack of testimony to show connection between flourine content of vegetation samples and that of the water samples. In this we can in no manner agree with Appellants. The effluents from the manufacturing plants of the Appellants were carried on the surface of the water to the same extent as they were carried over the surface of the land, and were deposited upon the surface of the water in precisely the same manner as they would be deposited upon vegetation and real estate. The fish were in the water and were exposed to and stored the fluorine in their bodies over a long period of time as did vegetation. Appellants' own exhibits showed fluorine content of the Meader water of 4.7 ppm. The Appellants attempted to prevent a disclosure of this testing. Examination of Food Machinery & Chemical Corporation's answer to interrogatory No. 10, appearing at pages 32 and 33 of the

record, shows that they at that time claimed there were no individual results available of water testing on the Meader properties for the year 1953. However, Exhibit 5 is one of the exhibits which Appellants produced in Court and which was admitted in evidence by the Court after strenuous objection by Appellants. Table 9 as contained in that exhibit shows various testing of the Meader ponds as made by the Appellant, Food Machinery & Chemical Corporation, during the year 1953. Among those testings, was testing of Spring No. 1, referred to in the table as 10-A, showing a range in 1953 of .5 to 4.7 ppm. in running water. When Mr. Kass was asked whether or not he had the breakdown as to those individual tests, he testified they could not be located. However, in the answer to the interrogatory as referred to no mention whatsoever was made of the 4.7 ppm., but in fact the answer was given as an average. No breakdown was given as to the particular fluorides shown on these testings, but it is significant that the testings also showed the P205 content of these springs, and that content in spring 10-D was up to 7 ppm. P205 is phosphorus pentoxide and is a product emitted both by the Simplot plant and by the Food Machinery plant. Phosphorus pentoxide is highly caustic and reacts violently with water to evolve heat. The phosphate was the material processed by both of the plants of Appellants and there was no other possible source for the fluorides or for the phosphorus pertoxide than the plants of the Appellants. The testimony of Mr. Kass, an adverse witness to Appellees matter, appears in the record at pages 243-247.

Appellants have taken portions of Dr. Gale's testimony

without relation to other portions of his testimony and insist that Dr. Gale's testimony was in no way applicable to the Meader trout and the Meader eggs. In so doing, Appellants overlooked much of Dr. Gale's testimony, the full purport of which cannot be obtained without reading all of his testimony as it appears in the record. Actually, Dr. Gale in the course of his testimony stated that as to mature trout any amounts of flourine in excess of 3 ppm. in reaching the cells was going to have a damaging effect and in the case of less than mature trout, less than 3 ppm. would have its affect. The fish has as a storehouse mechanism, bones, which can store fluorine up to certain amounts as testified to by Dr. Gale and these amounts may be accumulated over a long period of time from exposure to less than a constant level of 3 ppm. Consequently, any amount in the Meader waters in excess of the amount which the fish could properly store and eliminate was going to and did reach the tissues.

Dr. Gale testified positively that any living thing or life taking over 3 ppm. through their kidneys will get into some difficulty in their cellular structure and that such was well above the normal environment tolerance. R. 277.

The evidence is absolutely undisputed that the Meader trout did have in the viscera and tissues 14 to 77 ppm. fluorine. This, when coupled with the direct and positive testimony of Dr. Gale, leaves little room for doubt as to the cause and the effect of the fluorine emissions from the Appellants' plants upon the Meader trout and eggs. Appellants' witnesses at no time explained why trout outside the industrial area had

only 2 ppm. fluoride in viscera as compared to 14-77 ppm. fluorine in Meader trout. This conclusively shows excessive amounts of fluorine were reaching cells of the Meader trout.

At pages 313 to 319 of the record, Dr. Gale, under cross-examination, discussed the ability of trout to detoxify excess amounts of fluorine. Upon being asked whether or not an adult trout could detoxify an excess amount of fluorine, Dr. Gale said that if the fish could escape the environment or get into another section of water where no fluorine existed, the cells that had been destroyed by the excess fluorine would be replaced, but there would be an affect, because fluorine is such a poisonous compound. R. 314. Dr. Gale also testified that if the older trout has not already built up a high concentration from living in the environment in the area, if he had not filled his toxicity storehouse, he would be able to detoxify more fluorine than a young fish over a period of time. Nevertheless, the trout would be affected and his metabolism would be different than originally created. The trout can only properly handle 3 ppm. of fluorine and any excess, anything retained, would cause chemical combinations with enzymes and would inhibit some of them. R. 316. Dr. Gale repeatedly stated that fluorine is one of the most toxic substances known and it affects everything.

At pages 310 and immediately following of the record, Dr. Gale discusses the effect of the fluorine ion upon trout eggs. In this regard, Dr. Gale stated that the fluorine ion is such a small molecule that it can go through the placenta of the trout and harm the eggs.

At page 293 of Dr. Gale's testimony, it is made clear that Dr. Gale actually testified that small amounts of fluorine ingested could and would build up a concentration in an amount which would be harmful to the cellular life of the trout. The following appears on that page of the transcript:

"Q. When you are talking about 3 parts per million as compared to cells, you are talking about the percentage reaching the cells?

A. Yes.

Q. You are not talking about the parts per million in the alfalfa that the cow consumes, is that correct, when you are talking of the 3 parts per million?

A. Of the total food.

Q. The effect you are talking about when you gave the testimony as to the effect on the enzyme system, what is that based upon, that number of parts per million reaching the cells?

A. Yes, sir.

Q. That is not the amount of the parts per million of what is taken in?

A. Yes sir.

Q. It is what reaches the cells?

A. Yes, sir. If you kept it up you would get that concentration.

Q. Over a period of time?

A. Yes sir.

Q. Insofar as your knowledge of fish and this area, and as to the Meader water and the Meader fish, what is the fact as to whether any of that knowledge has any effect in your opinion and your statements of your study of fluoride on cell life?

A. I wouldn't change my mind. That is a big question. All of the texts of biochemistry gives the figures. We have had the work in the field for years, I can't change my mind on that.

Q. Doctor, you were asked whether you know any of the emanations from the Westvaco Plant and the Simplot Plant, and you said you didn't.

A. To be fair, I live in Pocatello, and all I know is the things you naturally hear or smell.

Q. And what you see?

A. Yes.

Q. Are you acquainted with hydrogen fluoride?

A. Yes.

Q. And silicon tetra fluoride?

A. No sir. I have an idea of what it is from the name.

Q. Now, as to the toxic effect on cell life, what do you have to say as to whether all of the fluoride family, if it reaches the cells, would have an effect on the cell life?

A. That is the enzyme system. It would all have an effect unless it reaches there in a insoluble form. The fluoride has the ability to unite with something—I can think of one product—if you could produce freone, a gas that is light, it would go up, you might not be able to get the true fluorine effect from freone, all of the elements are present. If it's available to the body, it will block the body processes.

Q. Regardless of the type?

A. If it is soluble at all, from fluorides emitted between the molecules and for a moment it is available to anything that it can be stuck to, and if an enzyme is there, it will stick to you.

Q. You testified that you are familiar with the hydrogen fluoride in a gaseous state.

A. Fluoride and hydrogen fluoride are gases.

Q. Now, when you talk about reacting in such manner, do they mix with dust particles in the air?

A. Would you restate that?

Q. Hydrogen fluoride is a gas.

A. That's right.

Q. Does that gas have a reaction with any known substance?

A. It is very reactive, yes, sir. It will react with other elements in the water.

Q. And it is reactive to water?

A. Yes, sir.

Q. Is it soluble in water?

A. Yes, sir.

Q. Would hydrogen fluoride have the effect on the enzyme system as you have discussed it here?

A. Yes, sir.

Mr. Racine: That is all."

Appellants attach significance to tests of water taken in the fall of 1955 by Utah State College and other tests of water taken by the University of Idaho, commencing in June of 1955. It is important to note that these tests were taken in the years following the heaviest emissions from Appellants'

plants. No showing was made that any tests were taken at times when the fumes and emissions were settling on the Meader property. In the spring of 1955 the Appellants state that they had reduced the emissions from some 6500 lb. per 24-hour period emitted from the Food Machinery Plant to 600 lbs. and 484 lbs. emitted from the Simplot plant per 24-hour period to 190 lbs.

Actually the record shows that the Appellants were only estimating as to 1953 and even 1954 and had no accurate measurements. Simplot had no true records from which they determined the matter at all. R. 400-436. Ex. 12, R. 432-434. Simplot at times was actually releasing as much as 2137 lbs. of gaseous fluorides per day in 1953. R. 433. This, coupled with Food Machinery's estimate, considerably increases the pounds emitted by the plants above the figures used in the calculations of Appellants appearing at pages 67 and 68 of their Brief.

The argument contained on those pages also completely overlooks the unwashed fluorides on the vegetation and overlooks the fact that the fish were in the water and could not leave the water and would ingest and store fluorides in their bodies. Plant life in this vicinity contained fluorides up to 300 ppm., clearly showing, regardless of any assertions made by Appellants, that the contamination from the plants was deposited on the properties in amounts far exceeding those which Appellants attempt to illustrate by their various formula.

The formula used by Appellants at pages 67 and 68 of

their Brief do not accurately consider wind. The facts as to the wind directions, prevailing winds and inversion are contained in Exhibit 41 and the testimony of the United States Weather Bureau meteorologist. R. 1099-1107. Exhibit 41 contains the information as to winds for each hour during the years 1953 through 1956. The meteorologist explained that prevailing wind does not mean that the wind is not blowing from any other direction, but only that it blew more hours that day from the direction which is designated as the prevailing wind. In the calculations of Appellants, only prevailing winds were used and no effect was given to calm days or other winds blowing a given number of hours from other directions, which would carry the effluents to the Meader properties from the manufacturing plants of Appellants. Also, no regard was given to the so-called "valley wind" flowing down the Portneuf River upon which the Meader Hatchery was located. The metorologist stated that wind is never a constant, steadying force from one direction, but is a free gas that is flowing and eddying. The meteorologist stated that he was familiar with inversion, knew it existed in the area of the Meader Trout Farm and that he had seen smoke and smog that the inversion phenomena did affect on the Meader Trout properties. Inversion would hold smoke and smog below the inversion height and cause it to remain in one area without dissipating. R. 1106-1107.

Dr. Wood stated positively that fish can be poisoned by fluorine and can have fluorosis. R. 1058. He stated that the symptoms of fluorosis in fish are lethargy, loss of appetite, rapid and convulsive twitching movement, followed by death.

R. 1058. All of these are consistent with effects in the Meader fish. Dr. Wood also agreed that chronic floride poisoning can be caused by small quantities of fluoride which produce no apparent effects when administered singly, but may lead to marked changes when their ingestion is continued. These present different phenomena according to the intensity and duration of exposure when the water supply contains excessive quantities of fluoride, to extensive bone changes and functional disturbances in heavy industrial exposure. R. 1090-1091. It is also absolutely clear that Dr. Wood has made no study of air pollution, had no knowledge as to how far the emissions from the Appellants' manufacturing operations would travel, had no knowledge as to the particles of gaseous matter in quantity that come out of the Appellants' plants, and had no knowledge as to the manner in which those particles of gaseous forms would be distributed. R. 1065-1066.

Appellants make a point of the profits from the hatchery operation in 1955 and from that argue that there wasn't anything wrong with the hatchery after all, and that they had raised a great number of fish and had simply been accumulating them over the years. They also apparently argue that the hatchery just wasn't managed and operated properly. Of course, this argument as to mismanagement is completely contrary to all of the facts and rests entirely upon the opinion of Dr. Wood. All other witnesses testified that the management was sound and that there was no disease and no other difficulty with the fish excepting that which would be caused by the fluorides.

The matter of the profit in 1955 was fully explained.

The eggs could not be sold and the Meaders attempted to hatch such eggs as they could and accumulated such fish as they could. The egg hatch in 1955 was better than it had been in the previous years. This was perfectly consistent with the reduced emissions from the Appellant's plants in that year. R. 785. The evidence shows without dispute that the Meader operation was primarily an egg station with eggs being sold to a market all over the world, developed through many years, and this was the primary source of income. To make the income in 1955, the entire operation was changed. No eggs were sold in 1953 or in 1954 and the hatchery operated at a loss, with all of the expenses continuing. An attempt was made to hatch such eggs as could be hatched and to raise such fish as could be raised in the years 1953 and 1954, and in 1955. Then, in 1955, accumulated fish were sold, not eggs.

This argument of the Appellants is as the other arguments advanced, one in which there might be a difference of opinion, but one which would not require the jury to find as urged by the Appellants. Substantial evidence existed upon which the jury disregarded the argument as now advanced by Appellants.

Even though Appellants reduced the amounts of fluorine emissions from the plants in 1955 and 1956 which may have resulted in lesser amounts of fluorine being deposited in the waters, nevertheless, the heavy emissions of fluorines during the previous years had unbeknown to Meaders already taken their toll. The spawner trout had exceeded their fluorine toxicity storehouse so that their enzyme processes had been affected, resulting in infertile and inferior eggs and abnormalities in a large number of fish which were hatched. This

manifested itself in 1955 and 1956, even though emissions from Appellants' plants had been reduced. This result is completely supported by Dr. Gale's testimony.

We do not argue that Appellants are not entitled to believe what they desire from the evidence which they prefer to give most weight. However, we do strenuously and respectfully assert that the record fully justified the Trial Court in overruling the Motion for Non-Suit, Motion for Direct Verdict, and Motion for Judgement Notwithstanding the Verdict, as made by Appellants. Likewise, the evidence is substantial and fully justified the jury in its verdict.

At pages 75 to 77 of their Brief, Appellants attempt to develop argument and authorities which would show prejudical error in the failure to give resquested instruction No. 2 assigned as error under specification VIII. A comparison of that requested instruction with the instructions actually given by the Court shows that the requested instruction was covered and that the requested instruction in itself did not state all of the applicable law as actually given to the jury in the courts instructions. The cases cited by Appellants, the *McNichols* case, 74 Ida. 321, 262 P. 2d 1012, and the *Koseris* case, Ida. 352 P. 2d 235 in no manner support the contention that the Appellants did not maintain a private nuisance as to the trout and trout eggs of the Appellees. *Amphtheatres, Inc. v. Portland Metals,* 198 P. 2d 847, cited under this proposition at page 27 of Appellants' Brief, was an action for an injunction against a race track from casting a light on an outdoor movie screen. The light was about the same as provided by a full moon. The

Court in that case simply said that the existence or non-existence of a private nuisance is generally a question for the jury but because the alleged nuisance was nothing more than that which a full moon would provide, obviously no nuisance existed. The other cases were likewise different on their facts and generally an injunction was asked. Here, no injunction was involved. The action of the Appellees was one for damages. The *Koseris* case, Idaho, 352 P. 2d 235, involved the comparative injury doctrine and since the action was one for injunction and not for damages the Idaho Court merely refused to grant an injunction, but certainly did not hold that the actions on the part of the Defendant in that case were not a nuisance and that the Plaintiffs were not entitled to damages.

The parties furnished the Trial Court trial briefs covering all of the requested instructions and covering what was felt to be the law applicable to the case under the theory each of the parties advanced. All of this was carefully considered by the Court during the trial and prior to the giving of instructions to the jury.

From the facts and circumstances of this case and the instructions as given by the Trial Court relating to nuisance, we believe that the Court undoubtedly would have been in error in refusing to submit the question of nuisance to the jury. It was for the jury to determine whether or not the activities of the appellants as they affected the appellees were in fact a nuisance and did in fact damage the Appellees.

The following cases establish the law of nuisance as applied to the facts and circumstances shown by the evidence:

Permanente Metals Corp. v. Pista, et al; CCA 9, 154 F.2d 568, page 570, where the court said:

"Aside from the evidence on the subject already mentioned, substantial support for the award is to be found in a comparison made by an admittedly qualified witness between the crop produced on appellees' orchard and that produced in a nearby orchard lying outside the dust zone, but otherwise similarly circumstanced in all material respects and subject to the same natural causes and elements. In the case of the latter orchard, unaffected by the dust, the crop was shown to be about 60 per cent of normal whereas the yield on appellees' orchard was not more than 10 per cent of normal. It was upon this comparison that the trial court appears most heavily to have relied."

McNichols v. Simplot, 74 Ida. 321, 218 Pac. 2d 695; *Mullen v. Jennings,* 141 Kan. 421, 41 Pac. 2d 753; *Morgan v. Tigh Ten Oil Co.,* 77 SE 2d 683, 238 NC 185 (1953); *Sam Finley, Inc., v. Russell,* 42 SE 2d 452, (1947); *United Verde Copper Co. v. Jordan, et al.* 14 Fed. 2d 299; *Kelley v. National Lead Co.,* 210 SW 2d 728, (1948); *Volata v. Berthelet Fuel & Supply Co.* 36 NW 2d 97.

The Legislature of the State of Idaho has seen fit to provide for actions for nuisance, *Idaho Code, Section 52-111,*

and define it in a separate section:

> *Idaho Code, Section 52-101*—NUISANCE DEFINED.
>
> "Anything which is injurious to health or morals, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use in the customary manner, of any navigable lake, or river, stream, canal, or basin, or any public park, square, street or highway, is a nuisance."

At pages 77 to 81 of Appellants' Brief, it is urged that the Trial Court committed reversible error in connection with Appellees' Exhibit 1 to 9. No authorities whatever are cited by Appellants. The Exhibit 1 was a report directly involving the witness, Kass, and he was interrogated as to his personal knowledge regarding that report prior to the report being in evidence. The objection was made by Appellants but the Court ruled that although the exhibit was not yet in evidence any part of the exhibit that Kass made as a report he could certainly testify regarding, as he knew whether or not he made those statements. R. 200-202.

The entire matter of the admission of Exhibits 1 to 9 was the subject of numerous conferences with the Court. Appellees' position was and is that those reports were made by Food Machinery in the regular course of business, constituted complete reports directly relating to the fluorine problem in the area in which the Meader properties are included and were relevant and material, and to the extent that any admis-

sions against interest were contained in those reports Appellees were entitled to the benefit of such admissions.

Appellants made general objections to the exhibits, including that the exhibits were prejudicial. Appelllees offered to delete any prejudical contents and deletions were made as to the items that were specifically mentioned by Appellants. This entire matter appears in the record, particularly at pages 906-908, 913-916. Appellants, pages 78 and 79 of their Brief, state that they offered to stipulate the materials from Appellees' Exhibits 1 to 9. No Stipulation was ever presented, nor was any summary ever offered. The Appellants make the flat statement that the exhibits were prejudical to them, but they in no respect point out the prejudice.

22 Am. Jur. Section 1049, page 888, states the rule applicable to these Exhibits, as follows:

> "The rule is well settled that for certain purposes reports made by an agent or employee to his employer, if such report is required of the employe or is made in the line of his duty, are admissible in evidence to prove a fact at issue. It has been held in some cases that such reports are competent both to affect the employer with notice of, and to establish as against him, relevant facts and existing conditions leading up to the cause of action * * *."

Appellants also insist that the Court committed reversible error in admitting Appellees' Exhibit 22. No Authorities are cited for this position. Exhibit 22 was an analysis of the

fish losses as prepared by Appellees' accountant from memorandums and records furnished by the Meaders. The accountant testified directly that the exhibit clearly reflected the information furnished him. The Exhibit was prepared in 1955. Objection was made by counsel for Appellants to the Exhibit. R. 667. The Court at that time reserved ruling on the exhibit. R. 668. Thereafter, Allen Gates, testified directly that he, while employed by the Meaders during the years involved in the law suit, made records concerning the loss of trout eggs and trout. R. 675-678. Mr. Gates stated that he compiled the information from which exhibit 22 was made by the accountant. R. 677. Under cross-examination, Mr. Gates testified as to how he compiled the information and how the information was delivered to the accountant each month. This cross-examination and the redirect examination concerning it is contained in the record, pages 678-708. The exhibit was finally admitted in evidence. R. 858-859. The court admitted the exhibit under the best evidnce rule, no fraud having been shown, and the persons who compiled the information having appeared and testified. Mr. Phil Meader testified that the information from which the exhibit was compiled had been compiled at his direction over the months and years by all of the men at the hatchery reporting the amount of dead fish in notes which the bookkeeper, Mr. Allen Gates, made a record of before they were taken to the accountant for the compilation which resulted in Exhibit 22. R. 606-609. The Appellants have demonstrated no prejudicial error regarding this exhibit.

The Rule is well settled that where original records have

been destroyed innocently or as a part of routine practice of the one keeping the records, a summary of such record made from the original record is admissible under the best evidence rules and the law permits the introduction of such evidence even though the original records are not available.

> *Edmunds v. Jellef*, 127 Atl. 2d 152; *Reynolds v. Denver & Rio Grande Western Railroad Co.*, 174 Fed. 2d 673 (10 CCA); 4 *Wigmore on Evidence*, 437, Seciton 1230 (3rd Edition, 1940); *4 Wigmore on Evidence*, 354, Section 1198 (3rd Edition, 1940); *5 Wigmore on Evidence*, 393, Section 1532 (3rd Edition, 1940); *4 Wigmore on Evidence*, 352, Section 1198, (3rd Edition, 1940); *Roddy v. State*, 64 Ida. 137, 139 P2d 1005; *20 Am. Jur. on Evidence*, 391, Section 438.

Appellants also urge that the refusal to admit Appellants Exhibit 35 was prejudicial error. This Exhibit involved the admission of certain water tests taken by Dr. Leonard. This matter has been disscussed in this Brief with respect to Section "C" of Appellants' Brief. It is clear that Dr. Leonard was not called by the Appellants and no foundation whatsoever was made by Appellants regarding the admission of this exhibit. Appellants cited no authorities as would support their contention that this exhibit was admissible or that they were prejudiced by it not having been admitted. The offered exhibit in itself did not show the times that any

such tests were taken, nor any of the circumstances surrounding such tests. Appellants had the opportunity to lay the foundation and they did not attempt to call Dr. Leonard, nor show that he was not available as a witness.

Finally, Appellants claim prejudicial error justifying reversal as to the refusal of the Trial Court to admit Appellants' offered Exhibit 20. This involved a letter, the contents of which had nothing to do with the law suit and the only purpose was to impeach the testimony of Phil Meader. Phil Meader testified that he did not remember giving Dr. Wohlers such a letter. Dr. Wohlers testified that either the original or a copy of such letter had been delivered to him by Phil Meader. Under these circumstances, the copy which was offered as Exhibit 20 could have no purpose whatsoever other than to introduce irrelevant matter. No basis for impeachment existed. The testimony of Mr. Phil Meader as to this Exhibit appears at pages 619-620 of the record. The testimony of Dr. Wohlers appears at pages 1014-1018. The ruling of the Court appears at pages 1018-1019.

We believe that the errors as to admission of evidence and instructions asserted by Appellants are wholly without merit and that no authorities are cited by them to establish otherwise, nor is any showing made that Appellants were legally prejudiced in such a manner as to justify reversal.

CONCLUSION

Appellees respectfully assert that the record shows sub-

stantial evidence entitling the jury to weigh and consider all of the facts and circumstances as shown. It is not the function of an Appellate Court to say that the evidence points more favorably to certain results than to other results, if in fact there is evidence shown upon which either result could be concluded by the trier of facts. For an Appellate Court to weigh the evidence is to usurp the function of the jury and take from the jury its right to consider and make its determination from all of the evidence and the inferences and intendments flowing from the evidence. The Supreme Court of the United States in *Sentilles,* 4 L. Ed. 2d 142, precisely states this view.

The judgment should be affirmed in all respects.

Respectfully submitted,

Louis F. Racine, Jr.
Hugh C. Maguire, Jr.
Attorneys for Appellees.

I hereby certify that copies of the above and foregoing Brief were served upon counsel for each of the Appellants in accordance with the Rules of this Court on the 6th day of February, 1961.

LOUIS F. RACINE, JR.

of Counsel for Appellees

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FOOD MACHINERY & CHEMICAL CORPORATION, a Corporation, operated as WESTVACO MINERAL PRODUCTS DIVISION,

and

J. R. SIMPLOT COMPANY, a Corporation,

Appellants.

vs.

W. S. MEADER and MAY MEADER, husband and wife,

Appellees.

Nos. 17058
17059

Reply Brief of Appellants

Appeals from the United States District Court
for the District of Idaho, Eastern Division

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED
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I.

STATEMENT OF THE CASE

Appellants in their statement of facts tried to present realistically the basic ultimate facts favorable to Appellees. Appellees merely state they are unable to agree with such factual statement, and we note they do not in a single instance point out to the Court where those facts are misstated.

Appellants, however, do not agree with certain statements in Appellees' brief, and we point them out specifically:

1. On Page 5 of Appellees' brief it is stated:

> "The concentrations of fluorides on the Meader property showed as high as 300 ppm. on vegetation * * *."

The record simply does not show any sampling of vegetation on the Meader property in the amount of 300 ppm fluoride.

2. Appellees, in discussing inversion, state on Page 44 of their brief:

> "* * * The meteorologist stated that he was familiar with inversion, knew it existed in the area of the Meader Trout Farm and that he had seen smoke and smog that the inversion phenomena did affect on the Meader Trout properties."

In support of this they cite R. 1106-1107. The meteorologist did not testify that the Meader property or trout were in any way affected by inversion.

3. On Page 5 of their brief, Appellees say:

> "* * * At page 325 of the record Dr. Gale stated directly that in excess of 3 ppm. fluoride would have an adverse effect on mature trout, whereas less than 3 ppm. would cause an abnormal growth and an adverse effect on younger trout. R. 325-326."

The record does not bear out the above statement. Dr. Gale did not say it would have an *adverse* effect on either mature or younger trout. Counsel for Appellees in his question used the word "effect" and it was answered in the affirmative by the witness without any statement or opinion whatever as to what the effect would be.

4. On Page 35 of Appellees' brief we find the following statement:

> "* * * The effluents from the manufacturing plants of the Appellants were carried on the surface of the water to the same extent as they were carried over the surface of the land, and were deposited upon the surface of the water in precisely the same manner as they would be deposited upon the vegetation and real estate. The fish were in the water and were exposed to and stored the fluorine in their bodies over a long period of time as did vegetation."

The record gives no justification for this statement. Neither fish, nor animals, store fluoride in their bodies as does vegetation. There is proof of only one analysis of vegetation on the Meader property for fluoride content, R. 1010. The comparison of vegetation with running water is fallacious, otherwise the analytical results for the two would be comparable; and common knowledge, as well as the survey by the University of Idaho, Exhibits 25, 26 and 27, conclusively demonstrate this is not the fact.

II.

ARGUMENT

Appellees in their argument repeatedly refer to samples and concentrations (always using the plural) in the Meader waters as showing "up to 4.7 ppm F." The wording used seems to infer there were samples in excess of 3 ppm fluoride graduating up to 4.7 ppm. The facts concerning the analysis of *all* the different water samples taken from the Meader waters including those taken by Westvaco, Stanford Research In-

stitute, Dr. Greenwood and the University of Idaho will clarify this.

Of some 96 samples taken from the Meader waters and analyzed for fluoride content, one sample, in the year 1953, shows a result of 4.7 ppm fluoride. Not one other sample of the entire number taken showed a result as high as 3 ppm, the highest being a sample in a spring of 2.4 ppm. (R. 962, 1048) In the four-year period, 1953 through 1956, there is the one analysis of water at Meaders showing 4.7 ppm, and every other sample taken is well below 3 ppm. In the entire record only two samples show over 2 ppm, one for 4.7 ppm and the other for 2.4 ppm, and not a single other sample shows a content of 3 ppm. Water samples from Meaders analyzed for the years 1954, 1955 and 1956 show a fluoride content of less than 1 ppm, except in two instances of 1.1 ppm. (Exhibit 6, R. 33, Vol. I, 17058 and Exhibit 26.)

To avoid any uncertainty or confusion as to the proof of the fluoride content of the Meader Hatchery waters in the record for the years 1953 to 1956, inclusive, we pinpoint and copy the record. The following results are for parts per million fluoride:

WATER SAMPLES, 1953

	Location	*No. of Samples Taken*	*PPM F. Range*	*PPM F. Average*
10a	Meader Spring No. 1.....	12	0.4-0.8	0.64
10b	Meader Spring No. 2.....	12	0.5-4.7	1.03
10c	Meader Spring No. 3.....	12	0.6-0.8	0.67
10d	Meader Entry to Portneuf...	12	0.5-2.4	0.78

INDIVIDUAL WATER ANALYSIS FROM MEADER'S TROUT HATCHERY

Date	*Hatchery Inlet*	*Hatchery Outlet*
3–22–54	0.9	0.6
5– 7–54	0.9	1.1
5–12–54	0.4	0.4
6–11–54	0.1	0.1
6–30–54	0.7	0.3
7– 8–54	0.3	0.3
7–23–54	0.3	0,3
8– 6–54	0.5	0.6
8–18–54	0.4	0.3
9– 7–54	0.6	0.6
9–17–54	0.3	0.1
2–14–55	0.5	0.6
3–14–55	0.5	0.5
4–11–55	0.5	0.5
6–13–55	0.5	0.5
7–18–55	0.5	0.5
5–18–56	0.5	0.5

Individual results for 1953 not available.

SAMPLES FROM POCATELLO AREA
1955, 1956, 1957
UNIVERSITY OF IDAHO

	Sample Periods		
Sample Number	*First*	*Second*	*Third*
W-12	.8	.3	.7
W-12	1.1	0.8	0.5
W-12	0.3		

WATER SAMPLES BY DR. GREENWOOD
9–29–55 and 10–10–55

Type of Material	*Location*	*Ppm F.*
Water	Runoff above rat pen	0.90
Water	Runoff on top of hill	0.52
Water	Blackfoot Pond runoff Northeast of Hatchery by Douglas Fence	0.86

Results above set forth are identified in the record as follows:

The analysis for 1953. (Exhibit 5, Table IX.)

Individual samples for 1954, Exhibit 6, under water samples more readily available. (R. 33, Vol. I, Case 17058.)

Individual samples for 1955, Exhibit 7, under water samples more readily available. (R. 33, Vol. I, Supra.)

Individual samples for 1956, Exhibit 8, under water samples more readily available. (R. 33, Vol. I, Supra.)

Individual samples by the University of Idaho for 1955, 1956 and 1957, Exhibits 25, 26 and 27, under water samples more readily available in Appendix to original brief of Appellants commencing on Page 83.

Individual samples by Dr. Greenwood, Exhibit 17. (R. 512.)

It will be observed there are actually 99 samples analyzed.

The figure, 4.7 ppm fluoride, stressed by Appellees, is found in 10b of the water samples for 1953, supra, which exhibit shows a range in the samples of 0.5 to 4.7 ppm flouride. This is an analysis of twelve samples, with an average of 1.03 ppm flouride. It is a mathematical impossibility for any other

one sample within the range to have exceeded 2.6 ppm. This is simply and easily calculated. The sum of 12 samples averaging 1.03 is 12.36. Subtracting 4.7 from 12.36 we have 7.66 for the remaining 11 samples. Assuming that 10 of those samples contained the minimum of 0.5, the total is 5.00. Subtracting 5.00 from the 7.66, 2.66 is the highest concentration possible. Of course, if more than one of the 11 remaining samples exceeded 0.5 ppm the second highest sample would be less than 2.66.

Appellees argue that one grass sample taken in 1951 on the Martin property, adjoining Meaders across the river on a bluff, proves the condition as to vegetation at Meaders from 1953 to 1956. Meaders is due north 1.8 miles from Westvaco as fixed by the University of Idaho.

What does the record show?

Exhibit 5 for the year 1953, page 17, gives the location of sampling sites. "Transect D" is due north of the Food Machinery & Chemical Corporation plant and the figures under "Sample Sites" are the miles from the plant. At this Transect, page 19, we find five samples taken 1.9 miles due north from May 21, 1953, to September 29, 1953, of alfalfa and sage, showing an average of 16.1 ppm fluoride.

In Exhibits 6, 7, 8 and 9 under the headings "Alfalfa & Sage" we find in "D Transect" the results and averages from samples taken due north of the plant at 2.0 or 2.1 miles. They are within the tolerance range levels for cattle.

On page 23 of their brief Appellees state:

> "But, the fact is that Exhibit 18 shows that the viscera in the Meader trout analyzed during the years

covered by the lawsuit did contain 14 to 77 ppm. fluorine; and Dr. Gale testified positively that 3 ppm. reaching the cells would cause the damage as described by him. Thus, it is a fact established by the record that the Meader trout did in fact suffer from fluorosis, and direct positive testimony of this fact does exist contrary to any assertion made by Appellants."

This statement of Appellees is without foundation and is a direct attempt to misconstrue the same as proof of a continuous condition existing *during the years covered by the lawsuit.* The analysis shown in the exhibit was made in the year 1954 (R. 32, Vol. I, 17058) and given to Phil Meader by Dr. Wohlers. (R.570.)

Exhibit 18 shows that only three fish were analyzed from Crystal Springs and six from the Meader Hatchery. The viscera of only one fish from Crystal Springs was analyzed, a two-pound trout, which is comparable to a spawner at the Meader Hatchery. The analysis shows 2 ppm fluoride at Crystal Springs and 19 ppm fluoride at Meaders. The exhibit shows that with the exception of bone all of the fish was analyzed as tissue. The skin of the two-pound fish from Crystal Springs shows 229 ppm fluoride and of the spawner at Meaders 127 ppm fluoride. In addition, the two-pound fish from Crystal Springs shows the parts per million of fluorine to be twice that of a two-year fish at the Meader Hatchery. The analysis for the muscle of the two-pound fish from Crystal Springs shows 5 ppm as compared to 3 ppm of the spawner at Meaders. The whole of two fish from Crystal Springs shows 40 ppm and 73 ppm, respectively, and the whole of two fish at Meaders 113 ppm and 69 ppm, respectively. The bone analysis of the two-pound fish from

Crystal Springs is 825 ppm and the spawner at Meaders 725 ppm. Only seven analyses of three fish were made from Crystal Springs and 19 analyses of six fish from Meaders, and regardless of Appellees' statements, in six instances the results were higher at Crystal Springs than at Meaders.

Again, on Page 37 of Appellees' brief we find another positive statement with reference to Exhibit 18, which is as follows:

> "The evidence is absolutely undisputed that the Meader trout did have in the viscera and tissues 14 to 77 ppm fluorine. This, when coupled with the direct and positive testimony of Dr. Gale, leaves little room for doubt as to the cause and effect of the fluorine emissions from the Appellants' plants upon the Meader trout and eggs. Appellants' witnesses at no time explained why trout outside the industrial area had only 2 ppm. fluoride in viscera as compared to 14-77 ppm. fluorine in Meader trout. *This conclusively shows excessive amounts of fluorine were reaching cells of the Meader trout.*"

The viscera of one trout at Crystal Springs showed 2 ppm and this is taken as a justification for the statement implying that other trout outside the industrial area were analyzed. Exhibit 18 was in Appellees' possession at all times when they were preparing for the filing of this suit, but Dr. Gale was not interrogated in any way with respect to the same.

The record is silent as to what amount of fluoride in the viscera of a fish would cause either chronic or acute fluorosis or would be damaging to trout eggs. This is the only proof that Appellees claim as direct, positive evidence of damage. It is not borne out by the record or the exhibit, and it is a gross

exaggeration to claim the exhibit is conclusive of excessive amounts of fluoride in Meaders' trout.

The only evidence in the record as to ppm fluoride in trout is found in Exhibits 17 and 18 and the testimony of Dr. Wohlers. (R. 1010.) Exhibit 17 is from samples taken by Meader, and Exhibit 18 by Stanford Research Institute. Adopting Appellees' argument, Appellants could well say that Exhibit 17, when compared with Exhibit 18, shows that the trout outside the industrial area had a higher fluoride content than at the Meader Hatchery because, in one instance, the analysis by Dr. Greenwood at Meaders shows less fluoride than an analysis of the whole fish from Crystal Springs. Of course, the fact remains that the few samples and analysis do not show in any instance a high fluoride content, and the record is still devoid of testimony that such fluoride content as was disclosed is in any way damaging to trout.

If the viscera of the trout analyzed by the expert Greenwood at Appellees' request showed conclusively the trout was suffering from fluorosis, it is strange he did not report it.

Appellees in their brief have limited themselves to only two possible instances which they contend establishes causal connection, namely Exhibit 18 and Dr. Gale's alleged tolerance levels of 3 ppm fluoride in contact with living cells and 4.5 ppm fluoride at a constant level in water (not flowing water), and one sample of water analysis of 4.7 ppm in the year 1953. We submit this evidence is completely insufficient to bridge the gap between cause and effect.

Appellants challenge Appellees to show any amount of fluoride in the Meader waters in excess of 1.1 ppm for the years 1954, 1955 and 1956, and challenge them to show a single

instance in the year 1953, except one, where there was any fluoride in the Meader waters in excess of 3 ppm. The entire gist of Dr. Gale's testimony goes to the proposition that fluoride being toxic, is harmful to a certain extent in any life. He did not even pretend to testify that fluoride of less than 3 ppm in contact with cell life, or that fluoride in a constant liquid solution of less than 4.5 to 20 ppm would cause any economic damage to trout. It is impossible to read into his testimony any statement or conclusion as to the amount of fluoride in running water necessary to cause death to trout daily, literally by the ton.

On Page 14 of Appellees' brief they make the following statement:

> "Dr. Gale did testify that fish would be affected in water with a content of from .2 ppm to 1 ppm of fluoride, R. 287. That a small amount of fluorine in the bone is normal, R. 287, but if fluorine is in the tissues and viscera he would be worried about it."

The record, 287, shows the answer of the witness to be:

> "There would be some effect just as the effect in people in fluoridation where we keep the parts per million down, it would be observable because they live in it."

Appellees' claim therefor is not supported by the record, and we submit the witness's answer cannot be construed as proof that the fish would be adversely effected or economically damaged. In connection with this testimony, Dr. Gale said on this point (R. 302.):

> "No, no more than to say this: It is a fact that concentration in water supplies from seven-tenths to 1.5 or so, which is the normal water supply addition, does have

an effect, and is observed by every dentist and every person in the mottling of teeth, that is a fact, and the gradation of effect (200) up to lethal dose will be proportionate to the concentration of the flourine in the water."

On Page 319 of the record he said:

"Below, That's right, I will accept that, because if it's 3 parts below, there will be an effect, but it will be a tolerable effect, just like the mottling of teeth or the hardening of the enamel in the water supply."

It is immediately apparent that the witness, in referring to the matter, had in mind the fact that drinking water is frequently fluoridated and that up to a certain part per million is held by many to be beneficial.

At Page 15 of their brief, Appellees state that Dr. Gale had testified (R. 287) that if there was fluoride in the tissues and viscera he would be worried about it. This statement is simply not in the record at the designated page, nor any place else.

Again, Appellees adroitly contend that Dr. Gale fixed a different tolerance level for trout than did Appellants' experts and argue that on this conflicting evidence the jury was entitled to believe Dr. Gale. So the jury could, as to tolerance levels, but to what avail when there is not only a clear lack of proof that the trout were subjected to such levels, but positive proof that they were not.

The results of the analysis by the University of Idaho for the years 1955, 1956 and 1957 are of outstanding significance since they disclose the entire area to be free of water contamination by fluoride. Also, these samplings show the same

result and the same fluoride content in waters at Meaders as do those by Dr. Greenwood, Stanford Research Institute and Westvaco. The University made the survey for the express and only purpose of investigating the conditions in the area of Appellants' plants.

III.

DISCUSSION OF APPELLEES' CASES

Appellees are proceeding apparently upon the theory that it is not the proper function of this Court to examine the evidence adduced at the trial to determine whether that evidence is sufficient to sustain the verdict. However, we know that this Court will painstakingly comb the record, as to all favorable evidence of Appellees, together with the reasonable inferences to be drawn therefrom, to determine whether Appellees have in fact carried the necessary burden of proof. As we read the cases cited by Appellees on the principal questions involved in this appeal, we detect one basic thread which runs through all of the cases, that is, each one must be assayed and evaluated upon its own facts; and general principals, while an aid to such an evaluation, do not change the basic fact that each case stands or falls on its own.

Bearing this in mind, and recognizing the validity of the general principals set forth, we submit that in the following analyses of Appellees' cases each one can be distinguished from the case at bar so that they have no application to the particular facts. Because of the limited requirements of space in this Reply Brief, and since our opening brief adequately covers in our view all of the questions involved in this litigation, we limit our discussion of Appellees' cases to those cited in Appellees' Points I, II and III of their Argument.

A. The following cases in Appellees' brief are cited for their general proposition that the Court will not search the record for conflicting evidence and will not reverse where the evidence equally supports inconsistent inferences:

Sentilles v. Inter-Caribbean Shipping Corporation, 4 L. Ed. 2d 142, is the principal case relied upon by Appellees not only on this question but also on the question of the weight to be given expert testimony. Likewise, this case was the principal one relied upon by Appellees in resisting the Motion for New Trial and Motion for Judgment Notwithstanding Verdict. Because of Appellees' dependence on this case, we deemed it necessary to procure the record on that appeal, and we have it before us. We will quote from portions of that record, and we advise the court and counsel that the record will be available at the request of the court, or of counsel, at any time. This was a Jones Act case in which the Court of Appeals reversed the judgment for plaintiff seaman, reasoning that he had failed to negate all the potential factors that could have produced the aggravation of a pre-existing tubercular condition. On certiorari the United States Supreme Court reversed. Appellees seem to imply that this decision has abolished the requirement that they show a causal relation between the acts of Appellants and their damage and that the jury has the right to completely disregard expert testimony, no matter how far removed from the common and reasonable experience of ordinary men. The plaintiff seaman in the *Sentilles* case in his brief on writ of certiorari made the statement:

> "It will be conceded, as stated in the Court of Appeal's majority opinion, that the petitioner, in submitting the items of damage relating to tuberculosis, was required to

prove that 'the aggravation of his tubercular condition was probably caused by the incident on shipboard.' "

The record in the *Sentilles* case discloses that there was direct, positive expert testimony from medical witnesses that the *probable* and precipitating cause of the aggravated tubercular condition was the traumatic injury sustained in the accident. There was conflicting evidence that the seaman's condition could be attributable to other diseases. We submit that in view of the circumstances the *Sentilles* case does not parallel the case at bar. Counsel cannot produce one scintilla of evidence in the record from the testimony of either laymen or experts that fluoride was the *probable* cause of the losses sustained by Appellees, or that it was a precipitating factor in the losses. In this case there was conflicting medical testimony, and the rule was followed that where reasonable men's minds differ their verdict will not be disturbed.

Fegles Const. Co. v. McLaughlin Const. Co., 205 F. 2d 637 (CCA 9). We have no quarrel with the quotation from this case, excepting only to say that it is inapplicable. The detailed evidence is not reviewed by the court, but the conclusion is reached that:

> "The evidence here not only supports the inference that the fire was caused by hot rivets, but it attains a greater degree of certainty than demanded by the rule, as it excludes every other reasonable hypothesis." (P. 639)

E. K. Wood Lumber Co. v. Anderson, 81 F. 2d 161 (CCA 9).

The quoted portion of this case should be limited by the preceding sentence which is omitted and which bears out our statement that each case must be viewed in the light of its own facts:

"It is sufficient to say that the cases reveal no fixed and inflexible rule."

B. Cited for Section II of their Argument that inferences from probative facts are not speculation if the inferences are probabilities by test of common judgment are the following cases:

National Lead Co. v. Schuft, 176 F. 2d 610 (CCA 8). There was competent, conflicting evidence in this case, and the theory of the defendant that the fire was caused by causes other than the negligence of the defendant was unsupported by proof and the appellate court merely resolved the conflict in favor of the trier of the facts.

Doctor's Hospital, Inc. v. Badgley, 156 F. 2d 569 (CCA, D.C.) was a simple negligence action involving the plaintiff slipping on an allegedly wet floor. There was ample and conflicting evidence as to the condition of the floor. The court indicated the jury could infer wet floors were easier to fall on than dry floors. How this case is authority for the complex problem of the effect of fluorides escapes us.

Newberry Co. v. Crandall, 171 F. 2d 281 (CCA 9). This was a simple negligence action involving slipping on a defective entrance way. While stating causation could be established by circumstantial evidence, the court stated that the inference of causal connection between the negligence and the injury "must be irresistible."

Bratt v. Western Air Lines, Inc., 155 F. 2d 850 (CCA 10). A directed verdict for the defendant was reversed solely upon the ground that the trial court erred in not permitting a practical mechanic to testify as an expert. The Circuit Court reviewed the qualifications and stated the witness was qualified.

Wardrop v. City of Manhattan Beach, 326 P. 2d 15 (Cal.) is inapplicable since in that case a qualified medical witness testified to the reasonable medical possibility that the negligence of the defendant caused the injury to the plaintiff,

Kyle v. Swift & Co., 229 F. 2d 887 (CCA 4). A food poisoning case involved expert testimony establishing a reasonable inference that the contaminated product of the defendant was the cause of the plaintiff's illness.

Spolter v. Four-Wheel Brake Service Co., 222 P. 2d 307 (Cal.) involved expert testimony, and the record shows several experts testified the negligence of the defendant could have caused the wheel to come off the automobile and one witness testified such was the *only* cause. We note this qualification omitted from Appellees' quotation in this case, relating to the inferences which the jury may draw from circumstantial evidence:

> "* * * This inference depends upon experience. When this experience is of such in nature that it may be presumed to be within the common experience of all men with common education moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference."

C. Cited for the proposition that the jury determines the weight to be given to the testimony of experts and that they need not surrender their judgment to the opinions of scientific witnesses are:

Carscallen v. Coeur d'Alene & St. Joe Transportation Co., 98 P. 622 (Idaho), is cited for the proposition that experts' testimony may be disregarded if it runs counter to the conviction of the jury. The experts in this case testified as to the

proper manner of handling a boat, which we submit is not in the scientific category of the effect of fluoride on fish life. The court stated with respect to such evidence:

> "* * * if it runs counter to their convictions of truth in the exercise of their own knowledge and judgment, they may disregard it entirely."

Michalic v. Cleveland Tankers, 5 L. Ed. 2d 20, involved suit under the Jones Act by a seaman who claimed injuries from improper tools furnished by the employer. Judgment entered for defendant on directed verdict was affirmed in the Court of Appeals but was reversed in the United States Supreme Court by a divided court, five members holding a jury question was presented, with four justices dissenting. The sole question involved was whether the jaws of the wrench involved were worn and ineffective. While there is no direct testimony to such fact, the opinion discloses the plaintiff seaman testified that it was an old, beat up wrench, chewed up on the end, and that it slipped on every nut he tightened. There was evidence of infrequent inspection, that the tool was four or five years old and had a beaten and battered look. In addition to the quoted portion in Appellees' brief, the court stated, after reviewing the aforesaid evidence:

> "* * * Plainly the jury, with reason, could infer that the colloquy between Michalic and the pumpman, and Michalic's testimony as to slipping, related to the function of the jaw of the wrench in gripping the nuts and that there was play in it which caused the wrench to slip off."

Again, we do not think this decision controls the case ar bar since all it does state is that direct evidence of a fact is not required but circumstantial evidence is sufficient.

IV.

CONCLUSION

Appellees contend the circumstantial evidence (1) that Appellants emitted fluorine from their plants; (2) that vegetation samples in the general area show the existence of fluorides; (3) that the loss of fish and eggs was unusual after the plants commenced operation; (4) that the phenomenon known as inversion existed; (5) that after a storm leaves from trees fell in the pond; (6) that cellular life will be effected from a constant environment of 3 ppm fluoride and above—that these circumstances coupled with one out of ninety-nine water samples showing a fluorine content of 4.7 ppm in rapidly running water, constitute sufficient evidence from which the jury may infer a causal connection between the fluorine emissions from Appellants' plants and the losses in the Hatchery. Appellees further state that the jury was entitled to completely ignore the testimony of two scientists, both of whom stated fluorine had nothing to do with mortalities at the Hatchery, and was entitled to substitute their own judgment in a complex scientific manner for the judgment of such experts. We submit Appellees have failed to carry the burden of establishing, other than through conjecture and speculation, the causal connection between the Appellants' emissions of fluorides and the damage to the fish and eggs. We submit further that this case does not come within the rule that where matters are of common knowledge the jury may substitute its judgment and give no credence to the testimony of experts. The evidence of the Appellees, irrespective of whether it be circumstantial or direct, does not meet the test laid down by this Court in *Arvidson v. Reynolds Metal Company*, 236 F. 2d 244 (CCA 9), where this Court affirmed the trial judge, who stated:

"Plaintiffs have not sustained the burden of producing a preponderance of *credible evidence* to establish (a) fluorine content in the forage on their lands in amounts *above non-toxic limits;* (b) substantial fluorine content in forage attributable to effluents from defendant's plants; or (c) that plaintiffs' lands or cattle *sustained fluorine damage in particulars with reasonable or any certainty.*" *Arvidson v. Reynolds Metal Company,* 125 F. Supp. 481. (Emphasis ours.)

Respectfully submitted,

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Nos. 17,058 — 17,059

IN THE

United States
Court of Appeals

For the Ninth Circuit

FOOD MACHINERY AND CHEMICAL CORPORATION, a corporation, operated as WESTVACO MINERAL PRODUCTS DIVISION,

and

J. R. SIMPLOT COMPANY, a corporation,

Appellants.

vs.

W. S. MEADER and MAY MEADER, husband and wife,

Appellees.

PETITION FOR REHEARING EN BANC

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SUBJECT INDEX

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Nos. 17,058 17,059

PETITION FOR REHEARING EN BANC

I. PRELIMINARY STATEMENT

This was an action for damages allegedly resulting from the operation of defendants' plants to plaintiffs' trout hatchery. The case, tried on a nuisance theory, resulted in a jury verdict for the plaintiffs, and judgment for damages. Upon appeal to this Court, the judgment was affirmed before a division of this Court composed of Justices Orr, Hamley, and Hamlin. Just-

ice Hamlin wrote the opinion of the Court.

As will be hereinafter in this petition demonstrated, serious error has been committed by the panel of the Court hearing this appeal, which justifies a rehearing thereof before this Court, sitting en banc.

II. GROUNDS FOR REHEARING EN BANC

A. The Court has clearly and obviously in its opinion, misstated the record on matters of evidence, vitally important to a correct determination of this appeal.

B. The Court has erred in failing to determine Appellants' Assignment of Error, No. 7, page 15, of their opening brief, which proposition of law is supported by authority, virtually undenied by Appellees.

C. The sole case relied upon by the Court to sustain its conclusion that the evidence in the case is sufficient to establish causal connection between acts of Appellants and damage to Appellees, — *Comeau v. Beck*, 319 Mass. 17, 64 NE (2d) 436 (1946) — is distinguishable from and inapplicable to the case at bar, and contrary to the substantive law of Idaho.

D. The decision of the Court departs from the law laid down in the prior fluorine cases decided by this Circuit.

E. From its discussion, Paragraph II, pages 11 and 12 of the opinion, it is apparent the Court has misunderstood Appellants' position with respect to the matters raised in Paragraph VI (c) of their opening brief.

III. DISCUSSION OF THE GROUNDS FOR REHEARING EN BANC

A. With deference we state the Court, by its affirmance of the judgment has clearly misunderstood and incorrectly referred to the printed transcript as showing, or not showing, certain facts, which errors and mistakes are clearly set forth and referred to as follows:

(1) On page 7 of the Opinion, in referring to Dr. Wohlers' testimony, the Opinion states.

> "However. it is worthy of note that he did not begin to run any tests until 1954, and that the tests on the leaves on the willows were not run in the "unwashed state." It would seem that it was not unreasonable for the jury to fail to give weight to these studies when it was shown that the leaves were washed before they were tested for fluoride concentrations. Washing would mean that the only fluorides that would show up in the measurements were those that had been absorbed by the leaf. Any fluorides that might have been resting on the leaves would have been washed away before the tests were made."

The above is not the testimony of Dr. Wohlers and cannot be so construed. R1010 and R1038. Dr. Wohlers ran the tests for total fluorides and only stated that he did not run them both in the "washed" and "unwashed" state. The tests, the day Meader called him to the trout farm, showed the total fluorides *on and in the leaves tested.*

An unintentional and grave injustice has been done to Dr. Wohlers as an expert witness and to the defendants in this misinterpretation of positive, undenied testimony. The tests were run in the "unwashed state." Dr. Wohlers did not run them in both the "washed" and the "unwashed" state, but running the tests for total fluorides was much more favorable to the plaintiffs and gave less chance of error than if an attempt was made to run two tests. R1036 and R1037. Dr. Wohlers further offered to break it down, R1038, as to soluble fluorides.

(2) On page 8 of the Opinion it is stated.

> "No one ever specifically analyzed one of the dead fish in order to determine whether it died of fluorosis, — apparently because no one ever was around to do so at the time that there were dead fish."

The positive, uncontradicted testimony of Dr. Wohlers is that he took some of the dead fish the day after the rain when Meader called him to the hatchery. These fish were analyzed for fluorine content and showed 173 ppm F for the whole fish, R1010. There was no denial of this fact and Dr. Wohlers considered the fluorine analysis of both the fish and leaves in his positive statement that fluoride was not the cause of the Meader damage.

(3) Following the statement (2) quoted above and a part of the same paragraph of the Opinion, page 8, we find this statement:

> "The best that we have are some analyses that

show higher than the three parts per million referred to by Dr. Gale as the danger area."

Exhibit 18 is not the only analysis of fish in the record, nor is it the best and only evidence we have. Dr. Greenwood, Exhibit 17, R512-13 made analyses of dead fish furnished to him by appellees. R510. We have Exhibits 18, 17 and Dr. Wohlers' analysis, R1010, all made from fish taken at different dates for analysis. It is clear, and the record so shows as above referred to, that these analyses were made of the *dead* Meader fish, the smaller fish analyzed being taken from the screen where Meader states they were dying.

Further, we correct the Court by stating that Dr. Gale did not refer to 3 ppm F in the whole fish, or any part of the fish, as being in the danger area. His testimony cannot be so construed, and we refer to Gale's testimony, R187 and 288. He would expect from 200 to 700 ppm of fluorine in bones of healthy trout in the same water.

(4) The Court, on page 7 of its Opinion states.

"However, we feel that from his testimony the jury could reasonably conclude that a concentration of over three part per million of fluoride in water could be harmful to adult fish and potentially more harmful to immature fish and to fish eggs."

This proposition of law was never contraverted by appellants, but was accepted at the trial. However, in view of the errors made by this Court as set forth in

Paragraph A, (1), (2), and (3) of this petition, it becomes immediately apparent that appellants were entitled to the giving of their requested instruction No. 31, Assignment of Error No. 7, pages 16 and 17 of appellants brief. How can this Court hold that appellants were not entitled to an instruction *on the crucial point that this Court cites as being conclusive.* Appellants were entitled to have the matter submitted intelligently and properly to the jury. In the lengthy instructions given by the trial judge, only the most meager reference is made, R118, to the proposition that plaintiffs must show causal connection between the fluorine emissions and the damage to the trout and eggs.

B. Surely the appellants are entitled, on their Assignment of Error No. 7, page 15 of appellants brief, to some reference to the authorities cited, which are virtually undenied by appellees. We submit it was substantial error to refuse this instruction which was most relevant to the measure of damages.

This Assignment of Error was for reasons unknown to us completely bypassed in the Court's decision.

C. The case of *Comeau v. Beck,* 319 Mass. 17, 64 NE 2d 436, which the Court regards as conclusive in the present case is clearly distinguishable from the case at bar, and it is not in accordance with the rule of law in the State of Idaho.

There, the Massachusetts court held that where there was medical testimony that a blow to the abdo-

men might cause injury producing miscarriage, when coupled with proof of a severe blow to the abdomen, this was sufficient to take the case to the jury. The Court held this "with hesitation." It did *not* hold that the medical testimony uncoupled with a showing of a blow or injury was sufficient for causal connection.

Under the facts in the case at bar, because Dr. Gale testified to the tolerance level of 3 ppm F, this does not begin to meet the test of the Massachusetts case, without further testimony that the fish or eggs were subject to such a level of fluoride above 3 ppm. There simply is no such testimony, excepting one single, isolated sample of 4.7 in the water over a period of four years. Dr. Gale further positively stated that he was not talking in terms of running water or water in a spring, but that his testimony concerned the amount either *constantly ingested* or *constantly in contact with the cell.*

What the Massachusetts court meant is shown by its later opinion, *In Re. Sevengy's Case*, 151 NE 2d, 258, where *Comeau v. Beck* (supra) was cited and distinguished.

This Court, in its Opinion, holds the Comeau case authority for the proposition that over 3 ppm F in constant concentration in water is damaging to fish, and thus the causal tie is made, *without proof of a concentration of such amount of fluorine.* There is positive proof that such concentration did not exist!

The causal connection in the Comeau case was estalished by the fact that the plaintiff suffered a severe

blow to the abdomen, when coupled with the medical testimony on the effect of such a trauma.

Destroying this Court's analogy, where in the record is the proof of the fish being in a constant environment of 3 ppm F?

The testimony of Dr. Wohlers that fluorosis is not the cause, is the only testimony on the subject and Dr. Wohlers is not discredited as this Court concluded in misreading his testimony.

We submit that the cases set forth under VI (A) of our opening brief are by far more applicable to the case at bar, both as to similarity of facts and law.

The Court comments on the dearth of controlling Idaho law on the proof necessary to establish causal connection between act and injury—(Opinion, page 10). We agree that each case must be governed by its own facts.

Idaho has an unbroken line of decisions dating back to 1895, which hold that the question of proximate cause cannot be left to the speculation, inference or conjecture of the jury. *Holt v. Spokane Ry Co.*, 40 Pac. 56 (Idaho) (1895). As stated in *McMaster v. Warner*, 258 Pac. 547 (Idaho) (1927) at page 552, where there was a suspicion, *but no probability* that livestock was infected with a disease of which the vendor thereof was aware:

> "Here, the only manner in which the heifer became unfit for the purpose for which she was purchased arose solely from the fact that at some

time she was attacked by the germ ray fungus with disastrous results to her as well as other animals of appellant's herd. It might be said that on account of the scar described by Dr. Erskine and others a suspicion might arise that she might have been affected with and operated on for lumpjaw before the sale. This reasoning is unsound for the rule has been repeatedly announced in this state that every party to a law action has a right to insist upon a verdict or finding based upon the law and the evidence in the case and not, in the absence of evidence, upon mere inference and conjecture."

The court cites the Holt case supra, among others in support of this principle. See also *Hargis v. Paulsen*, 166 Pac. 264, (Idaho - 1917); *Clark v. Chrisop*, 241 P (2d) 171 (Idaho - 1952); and *Splinter v. City of Nampa*, 256 P (2d) 215 (Idaho - 1953), cited in our opening brief, and in which our highest court, following the historically established pattern, stated, pg. 22:

> "*The weakness of appellant's case is the want of evidence to establish a causal connection between the location of the tank and the explosion otherwise than by speculation and conjecture. The law requires some substantial evidence that the negligence alleged was the proximate cause of the injury.*"

D. The fluorine cases cited in appellants brief in the Ninth Circuit and Tenth Circuit are directly applicable in the instant case to the scientific and legal principle involved.

Rather than repeat the argument from our opening brief in this connection, we respectfully ask this Court to review pages 37-40 thereof. Standards have been approved by this Court in measuring fluorine cases, which the Meaders in the instant case have wholly failed to meet. Justice Hamlin makes no reference to these cases whatever, yet they do exist, and are applicable to a resolution of the questions posed in this litigation.

E. The Opinion of the Court, pages 11 and 12, shows a complete misapprehension of appellants' position. Appellants do not and did not claim that appellees were required to introduce all their available evidence or that they were required to call their experts. We do submit, however, this Court, under the authorities, should consider the proposition of law submitted and raised by appellants as to the presumption which stems from appellees failure to put in such available evidence. It has a direct bearing on a fair analysis of the case and appellants further were not required to request any instruction to the jury. The presumption is, if Dr. Greenwood's analysis of Meader's dead fish, Exhxibit 17, had shown fluorine, Meader would not have overlooked it. The Opinion states:

> "It is not clear from appellants just what they expect this Court to do, but we will do nothing * * * "

All the appellants expect the Court to do is to apply

the applicable law to the case before it, and to this appellants are entitled.

In point on this question are the following Idaho cases: *Coeur d'Alene Lead Co. v. Kingsbury and Hensen*, 85 P 2d 691; *Vollmer v. Vollmer*, 266 Pac. 677; *Garrett v. Neitzel*, 285 Pac. 472; *Common School Dist. No. 27 v. Twin Falls Nat. Bank*, 299 Pac. 662; *Federal Land Bank of Spokane v. Union Central Life Ins. Co.*, 6 Pac. 2d 486; *Gem State Sales Co. v. Rudin Brothers, Inc.* 41 P 2d 614, 615.

IV. CONCLUSION

In the best of faith, and with proper deference to the panel that has heard this appeal, we must call to the attention of the entire court, the fact that appellants have not received a proper consideration of the questions raised in this appeal. This conclusion is at once inescapable from a careful analysis of the opinion of the Court dated August 25, 1961. The obvious and apparent errors made with respect to the evidence, the erroneous conclusions based on such misunderstanding of the evidence, and the failure to give consideration of any kind to the other matters raised on the appeal, as herein pointed out, makes us confident that this Court must and will afford relief to the appellants.

We respectfully request therefore, that in the alternative there be a reversal of the judgement, or that this petition for en banc rehearing be granted.

Respectfully submitted,

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No. 17060

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN RUSSELL KEEBLE, dba A. R. KEEBLE GLASS CO.,
Appellant,

vs.

IRVING SULMEYER, Trustee in Bankruptcy,
Appellee.

BRIEF OF APPELLEE.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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Appellant,

vs.

IRVING SULMEYER, Trustee in Bankruptcy,
Appellee.

BRIEF OF APPELLEE.

Jurisdiction.

The Court has jurisdiction of this appeal under Section 24a of the Bankruptcy Act, 11 U. S. C. Sec. 47a.

Statement of the Case.

Appellant filed voluntary bankruptcy and, by order dated August 20, 1959, was granted his discharge. On January 7, 1960, Appellee, the Trustee in Bankruptcy, petitioned to revoke the discharge on the ground that it had been procured through fraud. Hearing on this petition was held before Honorable Ray H. Kinnison, Referee in Bankruptcy, on February 25, 1960, resulting in an order of revocation entered March 11, 1960.

Appellant filed a timely petition to review the Referee's order of March 11, 1960. On June 16, 1960, the reviewing District Judge, Honorable Harry C. Westover, affirmed the Referee in Bankruptcy.

Notice of Appeal was filed by Appellant on July 15, 1960.

Statement of Facts.

Appellee, the Trustee in Bankruptcy, conducted an examination of Appellant at the first meeting of creditors on July 8, 1959. At this time, Appellant testified that he owned a lot in Big Bear, California; that it was encumbered by first and second trust deeds; and that the second encumbrance was a $2000 deed of trust which had been given to Appellant's brother in May, 1957, approximately two years before bankruptcy. [Tr., 7/8/59, pp. 6-7.] Questioned in more detail concerning the transaction under Section 21a of the Bankruptcy Act, Appellant, on December 1, 1959, repeated his testimony that the second deed of trust, and the note for which it was security, were prepared in May, 1957, two years before bankruptcy; and that the note was actually signed at that time, although the trust deed was signed in 1959. [Tr., 12/1/59, pp. 23-27.]

On February 25, 1960, it was proved at the trial on the revocation of discharge that this testimony was untrue. The particular bank forms upon which the note and second trust deed were prepared were printed for the first time in August, 1958, so that it would have been impossible for the documents in question to have been drawn up in May, 1957 as Appellant had testified. [Tr., 2/25/60, pp. 3-4.] Faced with this situation, Appellant admitted at the trial that he had actually prepared the documents shortly before bankruptcy in May, 1959, instead of two years previously [Tr., 2/25/60, pp. 18-19.] His explanation, which the Referee deemed either unacceptable or incredible, was that another note and trust deed had been made out in 1957, had been misplaced, and that the documents prepared on the eve of bankruptcy were intended as substitutes for the lost instruments. [Tr., 2/25/60, pp.

18-19.] The true fact concerning the date of preparation of the documents in question was not revealed by Appellant to his attorneys until after the false testimony had been given; had he been told the truth in time, Appellant's counsel would have prepared the bankruptcy Schedules and Statement of Affairs to reflect correctly the trust deed transaction, and the Trustee in Bankruptcy would not have been furnished misleading information. [Tr., 2/25/60, pp. 12-16.]

Question Presented.

Does the evidence support the holding below that Appellant made false oaths in his bankruptcy proceeding?

Statutes Involved.

Bankruptcy Act, Sec. 15, 11 U. S. C. Sec. 33:

> "The court may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it if it shall be made to appear that it was obtained through the fraud of the bankrupt, that the knowledge of the fraud has come to the petitioners since the granting of the discharge and that the actual facts did not warrant the discharge."

Bankruptcy Act, Sec. 14c(1), 11 U. S. C., Sec. 32c(1):

> "The court shall grant the discharge unless satisfied that the bankrupt has (1) committed an offense punishable by imprisonment as provided under title 18, United States Code, section 152;"

18 U. S. C. Sec. 152:

> ". . . Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; . . . Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

ARGUMENT.

Appellant Testified Falsely and Fraudulently With Respect to a Material Matter in His Bankruptcy Proceeding.

Appellant overlooks the basic proposition that findings of fact made by a Referee in Bankruptcy must be accepted on appeal unless "clearly erroneous." This rule is particularly applicable where, as here, the District Court has adopted and affirmed the Referee's findings.

> General Order in Bankruptcy No. 47;
>
> *Rogers v. Gardner,* 226 F. 2d 864, 866-867 (C. A. 9, 1955).

There is no question but that Appellant lied under oath with respect to the trust deed transaction. This being so, the observation of the Court of Appeals for the Second Circuit in *In re Slocum,* 22 F. 2d 282, 285 (1927), becomes pertinent:

> "Those who purposely answer untruthfully concerning material matters propounded upon their examination deserve no favor."

A. Appellant's False Testimony Was Fraudulent.

The Referee found in effect that Appellant intentionally made false representations and gave untrue testimony concerning the date on which the note and trust deed were prepared. [Finding of Fact No. 5.] Certainly he was correct in inferring from the evidence that the false testimony was not the result of inadvertence. It is inconceivable that Appellant could have forgotten about the preparation of the documents, since this occurred just before bankruptcy and was

thus fresh in mind. Indeed, Appellant does not now contend that his answers under oath were merely the result of innocent error. Rather, he seems to urge that since he expected to lose the Big Bear property in any event, and since he had been advised that the second trust deed was not valid as against the Trustee in Bankruptcy, it cannot be found that the false testimony was given "fraudulently" or with "intent to defraud."

With respect to this argument, it should be noted in the first place that the Referee, as the finder of fact, did not have to accept the testimony that Appellant expected the second trust deed to be invalidated in bankruptcy. Secondly, even if this was Appellant's expectation, the strongest inference is that the false testimony was given in the hope Appellee would be misled into not examining the transaction in detail. Particularly is this so in light of the fact that the trust deed holder was Appellant's brother, there being a strong motive on Appellant's part to protect his relative's financial interests by diverting the trustee from careful investigation of the encumbrance. If the trust deed went unchallenged in bankruptcy, the brother as a secured creditor would, of course, fare considerably better than he would as a general creditor. And an encumbrance believed to have been executed two years before bankruptcy would ordinarily receive less scrutiny than one which is suspicious on its face because made on the eve of the proceeding.

Thus, there is ample support for the Referee's conclusion that the untrue testimony was a false oath, *i.e.,* that it was fraudulent. As the Court of Appeals for the Eighth Circuit said concerning the "fraudulent

intent" element in *Aronofsky v. Bostian,* 133 F. 2d 290, 292 (1943):

> "It suffices that he knows what is true and so knowing wilfully and intentionally swears to what is false."

B. Appellant's False Testimony Related to a Material Matter.

Appellant further contends that the false testimony was not "material," but this argument cannot survive examination. A bankrupt's obligation under Section 7a(10) of the Bankruptcy Act, 11 U. S. C. Sec. 25a(10), is to "submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge. . . ." It is submitted that any information referred to in Section 7a(10), or called for by the Official Forms of Schedules and Statement of Affairs promulgated by the Supreme Court, is material for the purpose of a false oath. A question which may not seem material on its face might, if answered truthfully, lead to an inquiry which is clearly important to the bankruptcy administration. As Appellant's attorney testified, the same false statements upon which the discharge was revoked misled counsel so that Schedule A-2 and item 11 of the Statement of Affairs were incorrectly answered. [Tr. 21/25/60, pp. 13, 15.]

That the false testimony in issue was highly material becomes even clearer when certain substantive provisions of the Bankruptcy Act are considered. Thus,

the second trust deed, actually executed just before bankruptcy, was vulnerable to attack as a preference (Bankruptcy Act, Sec. 60, 11 U. S. C. Sec. 96), and perhaps as a fraudulent transfer. (Bankruptcy Act, Sec. 67d, 11 U. S. C. Sec. 107d). If Appellant by testifying falsely could have misled Appellee into believing that the trust deed was two years old, the encumbrance might not have been attacked, since only preferences made within four months of bankruptcy, and only fraudulent transfers made within one year, are vulnerable under the respective sections above referred to. Similarly, if the giving of the second trust deed amounted to a fraudulent transfer, this would constitute a ground for objection to Appellant's discharge, but only if the trust deed were given within the one year period preceding bankruptcy. (Bankruptcy Act, Sec. 14c(4), 11 U. S. C., Sec. 32c(4).) For these reasons, if for no other, any statements pertaining to the date of execution of the encumbrance were most material. Appellant's alleged intention not to defend the trust deed, even if concurred in by his brother, does not affect the legal materiality of the false testimony. It should be noted, moreover, that this so-called intention to abandon the trust deed was not revealed to Appellee nor to his counsel until after the false testimony had been given and Appellee was hot on the trail.

Whether false testimony is material does not depend upon whether the falsehood is detrimental to creditors.

In re Slocum, 22 F. 2d 282 (C. A. 2, 1927).

Appellant's present argument is similar to the one made in *In re Parsons,* 88 F. 2d 428 (C. A. 2, 1937). There, a bankrupt falsely denied under oath that he

had transferred certain property to his wife. His discharge was challenged on this ground. In defense, he proved that the property, as a matter of law, belonged to the wife before the transfer, and argued that, accordingly, the conveyance he had lied about lacked any legal effect. Nevertheless, the Court ruled that the discharge should not be granted because of a false oath:

> "When he was asked whether he had made a transfer, he should have disclosed the instrument of November 4, 1933, so that the trustee could properly investigate the bankrupt's affairs, and the question, we think, called for a disclosure of an instrument in which he quitclaimed his interest in the estate in remainder even though his interest as a matter of law had theretofore passed to his wife." (88 F. 2d at 429-430.)

Conclusion.

For the foregoing reasons, the Order of the District Court entered June 16, 1960 should be affirmed.

Respectfully submitted,

QUITTNER, STUTMAN & TREISTER,
By GEORGE M. TREISTER, and
HERBERT WOLAS,
Attorneys for Appellee.

No. 17070

United States
COURT OF APPEALS
for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC.,
an Oregon Corporation,

Appellant,

v.

HERSHEY CHOCOLATE CORPORATION,
a Delaware Corporation, et al.,

Appellees.

Upon Appeal from the United States District Court for the District of Oregon.

HONORABLE JOHN F. KILKENNY, Judge.

OPENING BRIEF OF APPELLANT ALBINA ENGINE & MACHINE WORKS, INC.

KRAUSE, LINDSAY & NAHSTOLL,
GUNTHER F. KRAUSE,
ALAN H. JOHANSEN,
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Proctors for Appellants, Albina Engine & Machine Works, Inc.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3-61

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STATUTES AND RULES

tion; Waltham Bag & Paper Company, a corporation; Zellerbach Paper Company, a corporation; Northwest Grocery Company, a corporation; Peyton Bag Company, a corporation; W. E. Finzer & Company, a corporation; and Hearst Publishing Company, Inc. (Pejepscot Paper Division), a corporation, against the SS ROBERT LUCKENBACH and and Luckenbach Steamship Company, Inc.

(2) Awarding to said libelants damages, in amounts to be later determined, against respondent Albina Engine & Machine Works, Inc., for cargo damage arising out of a fire occurring aboard the SS ROBERT LUCKENBACH on April 2, 1958, while said vessel was berthed on the Willamette River at Portland, Oregon.

(3) Awarding Luckenbach Steamship Company, Inc., damages in an amount to be later determined on its cross-claim and amended cross-libel against Albina Engine & Machine Works, Inc.

(4) Dismissing Albina's cross-claims and cross-libel against Luckenbach.

Jurisdiction of the District Court

The District Court's admiralty and maritime jurisdiction rested on 28 U.S.C.A., § 1333(1) and was invoked by the libels of the respective libelants which set forth claims for damages based upon an alleged maritime tort by respondents Luckenbach and Albina (R. 5, 9; as to remaining libels, see explanatory note in "Designation of Record for Printing on Appeal," R. 629).

Luckenbach's cross-claim against Albina for indemnity

or contribution was based upon Albina's alleged negligence and alleged breach of contract for ship repairs (R. 17). Luckenbach's amended cross-claim and cross-libel against Albina for damages was likewise based upon Albina's alleged negligence and alleged breach of contract for ship repair (R. 40).

Albina's cross-libels for contribution or indemnity from Luckenbach were based upon alleged negligence of Luckenbach and unseaworthiness of the vessel (R. 29, 30; 36).

Albina's second cause of suit and cross-libel against Luckenbach was to recover monies allegedly due and owing under a contract for repair of the SS ROBERT LUCKENBACH (R. 37).

The District Court's admiralty and maritime jurisdiction over the respective parties' cross-claims and cross-libels rested on 28 U.S.C.A., § 1333(1).

Jurisdiction of the Court of Appeals

The District Court's decree, entered May 16, 1960, was an interlocutory decree in admiralty determining the rights and liabilities of the parties (R. 92-94). On May 27, 1960, appellant Albina filed a timely notice of appeal to this Court (R. 95) within the time permitted by 28 U.S.C.A., § 2107 for proceedings in admiralty.

This Court has jurisdiction of the appeal by virtue of 28 U.S.C.A., §§ 1292(3) and 1294(1).

STATEMENT OF THE CASE

These consolidated cases were commenced by the respective libelants to recover for damage to their respective lots of cargo, resulting from a fire aboard the SS ROBERT LUCKENBACH while the vessel was berthed at Portland, Oregon, on April 2, 1958. Libelants contended that the fire was caused by the negligence of both Luckenbach and Albina and by unseaworthiness of the vessel (R. 56-60).

Respondent Luckenbach contended that the fire was solely caused by the negligence of Albina, and accordingly sought indemnity or contribution from Albina on account of any sums Luckenbach might be required to pay the libelants. Luckenbach also sought to recover from Albina consequential damages allegedly sustained by Luckenbach as the result of the fire.

Albina, in turn, contended that the damage sustained by libelants and Luckenbach was solely caused by the negligence of Luckenbach and the unseaworthiness of the vessel, and accordingly sought indemnity or contribution from Luckenbach on account of any sums Albina might be required to pay the libelants. Albina also sought to recover from Luckenbach the amount of Albina's bill for repairing fire damage to the vessel.

The basic question involves the relative responsibility of Luckenbach and Albina for the fire and the resultant damages to the various parties. As to many of the facts there is no dispute between the parties. As to many additional facts, the evidence is clear and unconflicting. The principal questions to be resolved by this appeal depend

upon the proper inferences and conclusions to be drawn from the basic facts, to determine the relative responsibility of Albina and Luckenbach for the damages flowing from the fire.

Because of the complexity of the various questions raised, and to minimize the necessity for discussing strictly factual matters in subsequent portions of this brief, a fairly complete statement of the case is hereinafter made.

Agreed Facts

In the consolidated pretrial order, the parties, with the approval of the Court, agreed to the following statement of facts (R. 50-56):

> "Libelants, Hershey Chocolate Corporation, Longview Fibre Company, Waltham Bag and Paper Company, Zellerbach Paper Company, Northwest Grocery Company, Peyton Bag Company, W. E. Finzer & Company, and Hearst Publishing Company, Inc. (Pejepscot Paper Division), were and now are corporations and were the owners of certain goods, wares, and merchandise which had by them been delivered in apparent good order and condition to Luckenbach Steamship Company, Inc., a corporation (hereinafter referred to as 'Luckenbach'), for delivery to Portland, Oregon, in consideration of agreed freight and in accordance with the terms and conditions of certain bills of lading.
>
> II.
>
> "Said goods, wares and merchandises were loaded as cargo aboard the S.S. Robert Luckenbach, an ocean-going cargo vessel, registry No. 245923, owned and operated by Luckenbach, and while aboard said vessel in the city of Portland, Oregon, received damage by fire or water while said vessel was undergoing re-

pairs performed and to be performed at said city by Albina Engine & Machine Works, Inc., a corporation (hereinafter referred to as 'Albina').

III.

"While said vessel was undergoing said repairs, a fire broke out aboard the vessel, which together with the water used to extinguish the same, caused the damage and loss of said cargo. At said time and place a section of the main fire line aboard the vessel had been removed. The fire aboard said vessel started as a result of sparks from welding by acetylene torch which was performed by employees of Albina, who were performing the repairs within the scope of their employment.

IV.

"In the forenoon of April 2, 1958, the Chief Officer of the S.S. Robert Luckenbach reported to Luckenbach's port engineer, Mr. Sterling, that one of the lower rungs was missing from the iron ladder located in the after part of No. 5 hold, and Mr. Sterling engaged Albina to install a new rung. At that time the lower portion of the after ladder, No. 5 hold, was obscured by cargo consisting of metal conduit pipe stowed in the after part of No. 5 hold. The repair work to be done on the after ladder was a welding job and could not be done while longshoremen were working in the hold, as they were. Accordingly, it was mutually contemplated that the repair work would be performed some time between 6:00 and 7:00 p.m., the longshoremen's meal hour, by which time it was expected that discharge of the metal conduit pipe would have been completed.

"The longshoremen ceased work for their meal hour at 6:00 p.m., and some time thereafter, Albina's three-man welding crew entered No. 5 hold of the ship to do the welding job. Said crew consisted of Smith, a boilermaker foreman, who was in charge; Larson, a welder; and Riley, a welder who was to act as fitter on this particular job.

"The ladder in No. 5 hold requiring repair by replacement of a missing rung was not, in fact, the after ladder in that hold, as had been reported to Sterling, but in fact was the forward ladder in that hold. Sterling, having left the ship, did not know this. Between the time when Sterling gave the order to repair the after ladder and the time the welders entered the hold, the cargo had been removed from around this ladder, and sufficiently removed from around the forward ladder, to expose both, so that it was evident to the welders which ladder needed repair. Accordingly, without further instructions, they proceeded to work on the forward ladder. Forward of this ladder, and extending clear across the width of the ship, was cargo consisting of several tiers of bales of burlap bags on the bottom, and cardboard cartons of construction paper on top. The distance between this cargo and the forward ladder, as stated by various witnesses, was from two to four feet. Mr. Smith placed two plywood 'walk-boards,' end to end, up against the cargo to serve as a screen or partition between it and the ladder. On the port side of the ladder he stood a carton or box next to and up against the plywood partition and extending aft from it, substantially at a right angle. In addition, he laid a one-inch board, athwartships, against and along the bottom of the plywood partition.

"The place where the Albina men stood to perform the welding job on the forward ladder was clear of cargo. On the deck at this place was a 'landing pad' which was a wooden floor covering the deck at this place used for landing cargo being loaded in the hold, thus protecting the deck from damage. Around the outside of this landing pad was a ramp which sloped slightly to the deck, the slope of the forward edge of this ramp being toward the forward ladder.

"The missing ladder rung was the second or third one up from the bottom. A temporary rung was in position there and was removed by Smith. The place where the new rung was to be welded in was between 4 and 5 feet above the landing pad (according to Smith).

"In the No. 5 hold there was a can variously estimated to hold from three to five gallons containing drinking water for the longshoremen who had left it in the hold when they knocked off work. To what extent this can was filled with water is not agreed to by the parties. The welding crew brought no fire-fighting or fire extinguishing equipment of any kind on board the ship.

"Albina's welder, Larson, struck an arc and began to burn off a small gob of metal where the old rung had been. Immediately, a spark or sparks or a piece of burning metal flew over the top of the partition and/or fell onto the forward ramp of the landing pad or upon the deck itself, rolled or bounced under or through the plywood partition, setting fire to the burlap bags.

"Smith and his men pulled the plywood partition apart and tried to extinguish the fire with water from the above-mentioned can but were unsuccessful. Smith and Riley then came on deck to lower a ship's fire hose and to obtain water pressure; Larson remained in the hold for a time to handle the hose.

"Meanwhile, the city fire department had already been called. The city firemen extinguished the fire with water from their own hoses. According to the fire department's records, the call was received at 6:20 p.m. The time interval between the calling of the fire department and the arrival of the fire department personnel on the scene has been stated by various witnesses to have been from three or four minutes up to fifteen minutes. The firemen had water in No. 5 hold within four minutes after their arrival.

"The fire in No. 5 hold so heated the bulkhead between No. 5 and No. 4 holds that there was a danger of fire occurring in No. 4 hold also. Therefore, the fire department poured water into No. 4 hold, damaging cargo stowed there.

"Some of the ship's plates and the bulkhead between

No. 4 and No. 5 holds were buckled and damaged by the fire, and the ship sustained other damage therefrom, all of which Albina repaired at a stated cost of $28,933.89.

V.

"At all times there were in full force and effect the following regulations:

Coast Guard, Department of the Treasury, Part 126, 'Handling of Explosives or other Dangerous Cargoes within or Contiguous to Waterfront Facilities';

Code of Federal Regulations, Title 33, Section 126.15, Volume 22, Federal Registry No. 246, published December 20, 1957;

Code of Federal Regulations, Title 46, Part 146 to 149, revised as of January 1, 1958, Section 146.27-100, pages 582 and 602;

City Ordinance of the City of Portland, Section 16-2527, passed by the City Council of the City of Portland;

Code of Federal Regulations, Title 46, Section 142.02-20."

The foregoing constitutes the agreed statement of facts from the Consolidated Pretrial Order. However, it is pertinent to here note that the parties also stipulated, in the Consolidated Pretrial Order, that testimony given before the U.S. Coast Guard Investigating Unit might, subject to objection as to materiality, relevancy and competency, be offered by any party and received into evidence, and that the foregoing agreed statement of facts might be supplemented by additional testimony on behalf of any party (R. 56).

Additional Facts Established by the Evidence

Albina called seven witnesses who testified at the trial. Otherwise, the evidence consists entirely of various exhibits, including the complete transcript of testimony before the U.S. Coast Guard Investigating Unit. References herein to testimony before the Coast Guard, as well as references to trial testimony, are to the pages of the printed record herein where such testimony appears.

Herbert W. Sterling, Luckenbach's port engineer, testified that pursuant to a verbal request from the chief engineer to him, and from him to Albina, Albina removed a section of the ship's fire line, which was defective, in order that the defective section might be replaced. Sterling directed Albina to remove the defective pipe and to furnish two blank flanges and install them on the fire lines (R. 315, 318). Sterling's request to Albina's representative, Bailey, with respect to renewal of the section of fire main was pursuant to a verbal order (R. 318).

Sterling inquired of the vessel's chief engineer if he could "handle the situation" of attaching to the fire line a hose for the purpose of furnishing water from a dockside hydrant to maintain fire protection while the section of fire line was removed from the vessel. The chief engineer indicated that he would take care of this problem, and relied upon the first assistant engineer to make the connection (R. 321, 322, 438). Sterling testified that there was a hose available right beside the fire line, and that all the engineer had to do was to move it five feet. When the fire started the chief engineer or the first assistant engineer was using the dock water hydrant and hose to

fill the ship's forepeak tank with fresh water and he could have connected that hose to the fire line. Sterling also testified that the engineer could have supplied water to the fire system by connecting a hose from the No. 6 plug on the bridge deck to the fire line. According to Sterling, the removal of the section of fire main did not totally cut off the fire line, water still being available to a 2½-inch fire plug in the port saloon deck alleyway (R. 321, 322, 438, 439).

Indeed, it appeared that even after the removal of a section of fire line, a vertical riser from the engine room fire pump would still supply water pressure to three stations on the port side, one on the saloon deck, one on the passenger berth deck, and one on the bridge deck (R. 323).

The chief engineer told Sterling that he would take care of supplying water to the fire system. Sterling had no plans that the contractor, Albina, was to attend to this, and no separate order, as would have been required, was given to Albina to conduct dock water to the fire line (R. 323, 324).

The replacement of a ladder rung in No. 5 hold (see agreed facts, R. 52, 53), like the repair of the fire line, was authorized by a verbal order from Sterling to Albina's personnel (R. 316-318, 485-490), in accordance with the established custom or practice between these parties, whereby Albina would perform repair work on Luckenbach's ships on the strength of oral authorization from Sterling, which was ordinarily later confirmed by written order (R. 586-588).

Radovich, Luckenbach's Marine Superintendent, learned well in advance of the arrival of the welding crew that it was the forward rather than the after ladder in No. 5 hold which needed repair, and Radovich telephoned to Richard Brewer, Albina's ship repair superintendent, advising that it was the forward ladder instead of the after ladder and directing that the repairs should be made between 6:00 and 7:00 p.m. that evening (R. 502, 503). Radovich's duties and specific functions included the direction and observation of loading and discharging cargo (R. 214, 215). He was responsible for coordinating the discharge of cargo with repair work to be done aboard the vessel (R. 216).

Radovich made arrangements for removal of cargo aboard Luckenbach vessels when Albina had to go into the holds for repair work (R. 495, 499). Albina looked to Radovich to fix the time when repairs could be made, and Radovich determined when the space would be available for such purposes (R. 504).

There was cargo in the forward end of No. 5 hatch when the welding crew arrived to repair the ladder. However, the foot of the ladder, an area from two to four feet forward of the ladder and to port and starboard of the ladder, was clear of cargo (R. 53).

The fire, once it started, could have been extinguished by the welding crew with a minimal amount of damage had water been available in the ship's fire line. Larson, the welder who stayed in the hold for a time to handle the fire hose (R. 574), testified that he stayed in the hold for approximately six minutes waiting for water to come

through the hose (R. 574). He could see how big the fire was before he came up out of the hold, could see where it was burning, and could have extinguished the fire if he had gotten water through the hose (R. 576). Up to the time he left the hold, the fire was confined to bales of burlap, in an area about the size of the clerk's desk (R. 576) which was later measured, pursuant to stipulation of the parties, and found to be eight feet long, 39 inches wide and 40 inches high (R. 585). There was no fire in any of the paper cargo at that time, and the fire had not gotten hot enough to do any damage to the steel of the vessel (R. 576). Larson estimated that it was "ten minutes, anyway" from the time the fire started until the first water was poured onto the fire by the fire department (R. 577).

Riley, the member of the welding crew who came up onto the deck and lowered the fire hose down into the hatch, estimated that it was two minutes from the time he first saw smoke in the burlap to the time when he lowered the hose down into the hatch (R. 555).

Smith, the welding crew foreman, who helped Riley get the fire hose out of the rack and who then went to the engine room to ask them to start the fire pumps (R. 525), also indicated that two minutes elapsed after the start of the fire until they had the hose down to Larson (R. 528). Assistant Chief Post of the Portland Fire Department and Battalion Chief Roth both indicated that they received a "delayed alarm" with respect to the fire, in that they were not called the minute the fire started, and that if water had been applied to the fire promptly

the damage would have been minimized (R. 407, 408, 428).

The Chief Engineer aboard the vessel, Mr. Hebert, testified at the Coast Guard hearing to the effect that he "was under the impression" that after Albina blanked off the fire line they would connect the shore line to the system (R. 280). However, the testimony of numerous other witnesses not only makes it clear that there was no basis for assuming that Albina would make such alternate connection, but that Hebert in fact made no such assumption.

Sterling, Luckenbach's Port Engineer, testified that the Chief Engineer, Mr. Hebert, said he would take care of having water in the fire lines and that there was no order or understanding that Albina was to do so (R. 321-323). Richard Bailey, one of Albina's repair Superintendents, testified that "Upon taking this section of line out, the Chief Engineer made arrangements for us to blank both sides of the line that *he* could have a solid main in the engine room and a solid main on deck and hook water up from the dock—or was to hook water up from the dock to this fire main so that *he* would have dock water on the fire main and ship water on the engine room." (R. 187, emphasis supplied).

Albina's other Superintendent, Richard Brewer, testified to being present during a conversation between Sterling and the Chief Engineer as to various repairs to be made, during which Sterling asked Hebert how the latter could maintain fire protection on the vessel, to which Hebert replied to the effect that he would have Albina's

pipefitters install blanks on the line so that he, Hebert, could maintain fire protection on the vessel (R. 487-489).

This conversation is corroborated by the testimony of the ship's First Assistant Engineer, Mr. Beutgen, who indicated that the Chief Engineer expected him, Beutgen, to actually make the connection to the fire line, but that he did not do so (R. 437-439). Beutgen said that the section of fire line was taken out at about 3:00 p.m. (R. 434), but that he did not then make the connection from the shore hydrant to the fire main system because he knew he was going to be right there just outside of a few minutes. He was apparently attempting to fill the ship's fresh water tanks, and expected to be finished with that by 6:00 p.m. but was not (R. 438, 439).

Mr. Beutgen, it appears, left the ship about 6:15 p.m. to walk up to the corner for a newspaper, and returned at about 6:40. Meanwhile, the fire had started and the fire department had arrived (R. 431, 432). It appears that the inoperative status of the fire main system had not been reported to any of the ship's crew outside of the engineering department (R. 285; 444). Indeed, Mr. Porter, the Second Assistant Engineer, testified that he was not advised of the removal of the section of the fire main until after the fire (R. 455). Also, Mr. Elixson, Junior Third Assistant Engineer, who was engineering watch officer on duty from four to midnight on April 2 (R. 298), the period during which the fire started, testified that he had not been informed and was not aware of any repairs being made to the fire main system (R. 298).

Thus, it appears that only two members of the ship's

crew were aware that a section of the fire main had been removed, the Chief Engineer, Mr. Hebert, and the First Assistant Engineer, Mr. Beutgen. Mr. Hebert had gone ashore at about 5:20 or 5:30 p.m. (R. 277). Mr. Beutgen, as indicated above, had gone ashore at about 6:15, before the fire started, and returned at 6:40 at which time the fire department had arrived (R. 432).

With respect to the fire damage repairs to the ship, it is admitted that Albina made such repairs at a stated cost of $28,933.89 (R. 55) and that payment has not been made therefor, although payment has been demanded (R. 42).

The uncontradicted testimony of Mr. John Sutherland, Assistant Secretary of Albina, established that these repairs were accomplished on the verbal authorization of Luckenbach's Port Engineer, Herbert Sterling, in accordance with the normal course of dealings between Luckenbach and Albina. It appears that Sterling instructed Albina to get along with the repairs, and that a written order would be forthcoming in the normal manner, but that Sterling later informed Sutherland, after the work had been done, that Luckenbach's New York office had advised not to issue a written order (R. 587-590).

Luckenbach's contention (Contention V, Consolidated Pretrial Order, R. 65) that Albina repaired the fire damage to the ship voluntarily, without any order to do so, and that its conduct in that regard constituted an admission of liability, was wholly refuted by the cross-examination of Mr. Sutherland by counsel for Luckenbach (R. 592, 593). There was no other evidence touching upon this subject.

Holding of the District Court

On the basis of the foregoing facts, the District Court held, among other things, that there was no obligation that Luckenbach would have its fire line in readiness and available during welding (Finding XVII, R. 91), that the fire was not caused by Luckenbach's design or neglect within the meaning of the fire statute and that Luckenbach was not liable to the libelants for the cargo damage or otherwise (Conclusions I, II, R. 91), and that the fire was caused solely by the fault of Albina (Finding XIII, R. 89). The Court further concluded that even if Luckenbach were liable to cargo, it would have a right of indemnity from Albina (Conclusion III, R. 91), and that Luckenbach was entitled to recover from Albina all its loss, damage and expense caused by the fire (Conclusion V, R. 91). The Court further concluded that Albina was not entitled to contribution or indemnity from Luckenbach (Conclusion V, R. 91), and that Albina was not entitled to collect its bill for repairing the fire damage to the ship (Conclusion VI, R. 92).

The Court adopted Luckenbach's Proposed Findings and Conclusions almost verbatim, including the adoption of the Court's Opinion as Findings and Conclusions (Finding II, R. 87) and entered its Interlocutory Decree accordingly (R 93, 94).

QUESTIONS ON APPEAL

The questions presented on this appeal by Appellant's Specifications of Error may be stated as follows:

I. Was it erroneous for the Court to adopt its Opinion as Findings of Fact and Conclusions of Law?

II. Should Luckenbach have been held liable directly to libelants for cargo damage? This ultimate question depends upon the five subsidiary issues raised under question III infra, and also upon the issue whether Luckenbach was insulated from direct liability to libelants by virtue of 46 U.S.C.A., § 182, the Fire Statute.

III. Was Albina's negligence the sole proximate cause of the damage sustained by libelants and by Luckenbach? This ultimate question depends upon resolution of the five following subsidiary issues:

(a) Was Luckenbach negligent in failing to remove flammable cargo from a hold where it ordered welding to be done?

(b) Was Luckenbach negligent in failing to provide an alternate source of water to the vessel's fire line, after the removal of a section of the fire main for repair?

(c) Was Luckenbach negligent in failing to man the vessel with competent personnel who were aware that a section of the fire main had been removed and who knew how to remedy the situation?

(d) Was Luckenbach guilty of negligence in violating applicable Coast Guard regulations?

(e) Was any unseaworthiness of the vessel, caused by the owner's lack of due diligence, a contributing cause of the damage to cargo or the vessel?

IV. Was Albina liable to indemnify Luckenbach on the basis of a breach of warranty of workmanlike service? This ultimate question depends upon resolution of the following subsidiary issues:

(a) As to damage to the ship and other loss allegedly sustained by Luckenbach, was any fault or breach by Albina a cause of such damage?

(b) As to the cargo damage, can Albina be held liable to indemnify Luckenbach without Luckenbach being liable to libelants in the first instance?

(c) As to the cargo damage, can Albina be held liable to indemnify Luckenbach (assuming Luckenbach was liable to cargo in the first instance) for such part of the loss as would not have occurred but for Luckenbach's neglect?

(d) Was Luckenbach's failure to remove flammable cargo from an area where it ordered welding to be performed, and/or its failure to supply water on the fire line, and/or its failure to man the vessel with competent personnel who were aware that the fire line was inoperative, such conduct on its part as would in any event preclude it from reliance upon an implied warranty of workmanlike service by Albina?

(e) Was Luckenbach precluded from relying on any breach of implied warranty by Albina, by rea-

son of Luckenbach's breach of an implied warranty of seaworthiness and of its express undertaking to supply water on the fire line?

V. Is Albina entitled to recover the amount of its bill for repair of fire damage to the ship from Luckenbach?

SPECIFICATIONS OF ERROR

I.

Finding of Fact No. II (R. 87) is erroneous in adopting the Court's Opinion as findings of fact and conclusions of law, in that the Court's said Opinion does not separately state findings of fact and conclusions of law and for the further reason that said Opinion is unsupported by and contrary to the clear weight of the evidence and is otherwise erroneous in law.

II.

The Court's Opinion, adopted as findings of fact and conclusions of law, is erroneous in making the following findings, conclusions, statements or holdings:

1. The Court erred in finding that "the can contained little water" (R. 76), in that such finding is not supported by any substantial evidence and is contrary to the clear weight of the evidence.

2. The Court erred in finding or concluding that Sterling did not know of the failure to connect the city fire hydrant to the ship, nor that any welding was to be done on the forward ladder in No. 5 hold (R. 77), in that such finding or conclusion is unsupported by any sub-

stantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

3. The Court erred in finding, concluding or stating that Albina's "use of an acetylene torch * * * under these conditions, was nothing less than wanton conduct. No doubt, it created a situation where the rule of absolute liability should apply" (R. 77, 78), in that such finding, conclusion or statement is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

4. The Court erred in finding or concluding that Albina was negligent by reason of violation of Code of Federal Regulations, Title 46, § 142.02-20 (R. 78, 79), in that said regulation is, as a matter of law, not applicable to a party in the position of Albina under the facts and circumstances in this case.

5. The Court erred in finding or concluding that said regulation applies to Albina (R. 79) in that said finding or conclusion is erroneous in law.

6. The Court erred in finding or concluding that § 16-2527 of the Police Code of the City of Portland is not in conflict with Federal statutes and regulations (R. 79), and such finding or conclusion is erroneous in law.

7. The Court erred in finding or concluding (R. 79) that Albina was negligent and caused the fire under specifications Nos. 1, 2, 4, 5, 6, 7 and 8 (of the Consolidated Pretrial Order) in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

8. The Court erred in finding, concluding or stating that Sterling ordered repairs to be made to the after ladder while the repairs were undertaken at the forward ladder (R. 79, 80), in that such finding, conclusion or statement is wholly immaterial to the issues in the case.

9. The Court erred in finding or concluding that Albina "without further instructions" made repairs at a place other than that where ordered (R. 80), in that such finding or conclusion is not supported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

10. The Court erred in finding or concluding that at 6:10 p.m., Radovich did not know that repairs were being made on a ladder other than pursuant to the original instructions (R. 81), in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

11. The Court erred in finding or concluding that Radovich was a subordinate and that his duties were very limited (R. 81), in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

12. The Court erred in finding or concluding that Radovich had nothing whatsoever to do with the repair of the ship (R. 81), in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

13. The Court erred in finding or concluding that the burden is on the libelant to prove that the neglect of the owner caused the fire (R. 82), in that such finding or conclusion is erroneous in law.

14. The Court erred in attempting to distinguish *American Mail Line, Ltd. vs. Tokyo Marine & Fire Insurance Co., Ltd.,* 9th Cir., 1959, 270 F. 2d 499, upon the basis that in the instant case there is no evidence that anyone failed to use reasonable diligence after the start of the fire (R. 83, 84), in that such distinction is of no legal import, and is immaterial under the clear weight of the evidence in this case.

15. The Court erred in finding or concluding that the fire statute is applicable (R. 84), in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

16. The Court erred in finding or concluding that Luckenbach and its superior officers were guilty of no negligence which caused the fire (R. 84), in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

17. The Court erred in finding or concluding that no superior officer for Luckenbach had anything to do with welding on the forward ladder (R. 84), in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

18. The Court erred in finding or concluding that Radovich had nothing to do with the repair of the ship or with removal of cargo from around the ladder (R. 84), in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

19. The Court erred in finding or concluding that Albina is liable to Luckenbach, on the basis of a breach of warranty of workmanlike service (R. 85, 86), in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

20. The Court erred in finding or concluding that Luckenbach is entitled to a decree against Albina for damage to the vessel (R. 86), in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

21. The Court erred in finding or concluding that Albina is not entitled to a decree against Luckenbach for the repairs to the vessel other than repairs independent of the fire (R. 86), in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

III.

Finding of Fact No. III (R. 87), that the fire was not caused by the design or neglect of Luckenbach, is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

IV.

Finding of Fact No. IV (R. 87), that the fire was caused by the gross negligence of Albina, is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

V.

Finding of Fact No. VI (R. 88), insofar as it finds that Radovich was a mere subordinate employee of Luckenbach and not a managerial officer, that his functions were confined to Luckenbach's dock in Portland, that he reported to his superiors in the Portland uptown office, and that he had nothing to do with repairs, is unsupported by any evidence whatever.

VI.

Finding of Fact No. VII (R. 88), insofar as it finds that Sterling did not know that the welding was to be on the forward ladder and that if the welding had been done aft there would have been no fire, is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

VII.

Finding of Fact No. X (R. 89), that Radovich had nothing to do with the repairs to the ladders and no knowledge with respect to removal of a section of the fire line, or the arrangements to supply substitute water from the dock hydrant, is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

VIII.

Finding of Fact No. XI (R. 89), insofar as it finds

that Radovich did not know the welders would be aboard until he saw the sparks, is unsupported by any evidence whatever, and the remainder of said finding is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

IX.

Finding of Fact No. XII (R. 89), that neither Sterling nor Radovich were privy to the cause or progress of the fire, is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

X.

Finding of Fact No. XIII (R. 89, 90), insofar as it finds that the fire was caused solely by the gross negligence of Albina, that the welding could have been safely done if proper and usual precautions were taken, that if any of the suggested precautions were taken there would have been no fire, that no precaution was taken, and that the only thing relied on was a can of longshoreman's drinking water which was utterly inadequate, is self-contradictory, is speculative, is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

XI.

Finding of Fact No. XVI (R. 90), that Albina made no objection to Luckenbach with respect to conditions in the hold, is erroneous in that it is immaterial, irrelevant, ignores other facts, and ignores Luckenbach's duty to be aware of conditions in the hold.

XII.

Finding of Fact No. XVII (R. 91), that there was no contractual or other obligation by Luckenbach with respect to the readiness and availability of the fire line and that Albina in no way relied on it when it undertook the job, is unsupported by any substantial evidence, is contrary to the clear weight of the evidence, and is otherwise erroneous in law.

XIII.

Conclusions of Law Nos. I through VI, inclusive (R. 91, 92), are contrary to law, unsupported by any substantial evidence, and contrary to the clear weight of the evidence.

XIV.

The Court erred in holding that the sole cause of damage was negligence by Albina.

XV.

The Court erred in refusing to hold that Luckenbach's negligence and/or the unseaworthiness of the vessel constituted the sole or a contributing cause of the fire.

XVI.

The Court erred in refusing to hold that Luckenbach's negligence and/or the unseaworthiness of the vessel constituted the sole cause of the spread of the fire beyond the burlap and construction paper stowed forward of the forward ladder in No. 5 hold.

XVII.

The Court erred in refusing to hold that Luckenbach's negligence and/or the unseaworthiness of the vessel constituted the sole proximate cause of all fire damage to the vessel.

XVIII.

The Court erred in refusing to hold that libelants had a right of recovery against Luckenbach.

XIX.

Based upon the foregoing points, Appellant Albina contends that the Decree of the District Court was erroneous in awarding full recovery to the libelants against Albina, and in awarding any recovery to cross-claimant Luckenbach against Albina, and in denying Albina recovery against Luckenbach on its cross-libels, and further contends that a decree should have been entered against Luckenbach, and in any event that the decree entered should have dismissed Luckenbach's cross-claims against Albina and should have allowed recovery against Luckenbach on Albina's cross-libels.

SUMMARY OF ARGUMENT

I.

The District Court erred in adopting its Opinion as findings of fact and conclusions of law, in that such procedure was contrary to Admiralty Rules, Rule 46-1/2, to Federal Rules of Civil Procedure, Rule 52(a), and was prejudicial to a clear presentation of the issues involved in this appeal.

II.

The District Court erred in holding that Luckenbach is not liable directly to libelants, in that the neglect of the owner, within the meaning of the Fire Statute, 46 U.S.C.A., § 182, was a contributing cause of the start of the fire, and the sole proximate cause of most of the damage.

III.

The District Court erred in holding that negligence by Albina was the sole proximate cause of damage sustained by libelants and by Luckenbach in that Luckenbach was guilty of causally-related fault in various particulars:

A. In failing to remove flammable cargo from an area where it had ordered welding to be performed;

B. In failing to supply water on the ship's fire line;

C. In failing to keep the vessel manned with a competent crew;

D. In violating Coast Guard regulations applicable to Luckenbach.

E. In failing to exercise due diligence to provide a seaworthy vessel.

IV.

The District Court erred in holding Albina liable to indemnify Luckenbach on the basis of a breach of implied warranty of workmanlike service in that:

A. No fault or breach by Albina caused any damage to the vessel.

B. There can be no duty to indemnify as to cargo damage, in the absence of liability from Luckenbach to libelants.

C. Luckenbach's conduct was such as to preclude recovery of indemnity from Albina on any warranty theory.

D. The personal injury indemnity cases relied upon

by the Court are not controlling in a cargo damage case.

E. Luckenbach itself breached an implied warranty of seaworthiness and an express undertaking to provide water on the ship's fire line.

V.

The District Court erred in holding that Albina is not entitled to collect its repair bill from Luckenbach.

ARGUMENT

I.

The District Court Erred in Adopting Its Opinion as Findings of Fact and Conclusions of Law

In accordance with the proposal of counsel for Luckenbach, the Court's Finding II (R. 87) adopts its Opinion as Findings and Conclusions.

It is to be observed that the Court's Opinion (R 72-86) does not contain findings of fact or conclusions of law as such.

It is clear that the adoption of the Court's Opinion as Findings and Conclusions in this case was in direct contravention to Admiralty Rules, Rule 46½, which provides as follows:

> "In deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under Rule 49."

The procedure followed by the District Court was also contrary to Federal Rules of Civil Procedure, Rule 52(a), which, insofar as here relevant, provides as follows:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. * * * If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. * * *"

It is believed that the remarks of Judge Leon R. Yankwich on this subject are particularly appropriate here:

> "Ordinarily, opinions cannot take the place of findings. However, at times, the courts have accepted opinions instead of findings where the trial judge so ordered. The amendment to Rule 52 allows findings of fact and conclusions of law to appear in the opinion.
>
> "Personally, I do not think the practice is satisfactory. In the last analysis, an opinion is, or is supposed to be, a reasoned discussion of the legal issues involved. Of necessity, only so many of the facts as are necessary to the decision will be put in it. The result is that very few opinions, in a complex case, can actually serve in lieu of findings. And if the judge incorporates, as a part of the opinion, specific findings on the issues involved, the losing party is deprived of the opportunity to object to the findings and to suggest changes. * * *" (Yankwich, "Findings in the Light of the Recent Amendments to the Federal Rules of Civil Procedure," 8 FRD 271, 286.)

In the present case, the adoption of the Court's Opinion as findings and conclusions has greatly hindered the presentation of the issues on appeal herein in clear and concise form. For example, in formulating its Statement of Points on Appeal herein, appellant found it necessary,

to avoid a possible waiver of any prejudicial error, to review the Court's Opinion bit by bit to find each statement therein which it considered to be erroneous. In many instances, statements in the Opinion which appellant regards as erroneous are not readily identifiable as either findings, conclusions, or mere *obiter dictum*.

As a result, the Statement of Points on Appeal contains one point (Point II, R. 618-623) which contains 27 subparts, directed toward various statements found in the Court's Opinion, in addition to 18 other points, each of which is directed toward some specific finding or conclusion of the District Court. See also Appellant's Specifications of Error, supra, pp. 20-28.

Appellant does not suggest that the decision of the District Court should be reversed solely on the basis that the District Court did not fully state its findings separately from its conclusions of law. However, in the event that this Court finds a reversal on the merits to be appropriate, appellant does urge that further proceedings herein, if such are necessary, will be greatly facilitated and clarified by a distinct statement of the District Court's Findings of Fact, stated separately from its Conclusions of Law.

II.

The District Court Erred in Holding that Luckenbach Is Not Liable Directly to Libelants

The District Court concluded that the fire was not caused by the design or neglect of Luckenbach within the meaning of the Fire Statute, 46 U.S.C.A., § 182 (Con-

clusion I, R. 91), and that Luckenbach is not liable to libelants for the cargo loss, damage, expense, or otherwise (Conclusion II, R. 91). Presumably, it was the District Court's conclusion that Luckenbach was absolved from liability by virtue of the Fire Statute.

It seems relatively certain that but for the Fire Statute and irrespective of whether or not Albina was also liable to libelants, Luckenbach would be liable to libelants for their cargo damage not only on the basis of negligence and unseaworthiness, but as a carrier and bailee of the libelants' goods which it failed to deliver in sound condition.

Be this as it may, appellant believes it clear that the Fire Statute is not properly applicable to this case. Albina's argument as to Luckenbach's fault, aside from the Fire Statute, is more fully set forth in subsequent portions of this brief. Therefore, Albina's argument with respect to Luckenbach's direct liability to libelants in the first instance is confined to a discussion of the Fire Statute as related to this case.

The Fire Statute

Luckenbach claims it is absolved from liability to libelants herein by virtue of 46 U.S.C.A., § 182, commonly known as the Fire Statute (and which was incorporated in the bills of lading, Ex. 6-A to 6-F. See R. 108, 465; these exhibits were transmitted to the Clerk of this Court, but were not printed in the Transcript of Record). This enactment reads as follows:

"No owner of any vessel shall be liable to answer for

> or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

It is well established that within the meaning of this statute "neglect" refers to the neglect of the owner personally, or, in the case of a corporate owner, to the neglect of managing officers and agents as distinguished from that of the master or other members of the crew. *Consumers Import Company v. Kabushiki Kaisha Kawasaki Zosenjo,* 320 U.S. 249, 88 L. Ed. 30 (1943); *Gosho Company v. The Pelican State* (D.C.N.Y., 1957), 151 F. Supp. 780.

It has been held that the owner of a vessel is chargeable with the negligence of a traffic manager employed by the owners who, in the absence of a general agent, had supervision over the condition of the ships as they came in and of any repairs they might need and whose word was final about their proper care in port, even though the traffic manager's superior was the owner's general agent, who was normally present in the port. *Great A. & P. Tea Company v. Lloyd Brasileiro* (CCA 2, 1947), 159 F. 2d 661, cert. den. 331 U.S. 836, 91 L. Ed. 1849.

The District Court made no specific finding as to whether or not Luckenbach's Port Engineer, Herbert Sterling, was a managing officer or agent of Luckenbach within the meaning of the Fire Statute. However, it is clear, under the case last cited, that Sterling was such

a managing officer or agent. Mr. Sterling himself testified that he had various duties as company representative for lots of ships' business, and that a part of those duties was arranging for the performance and completion of ship's repairs for vessels coming into port (R. 314). Mr. John Sutherland, Assistant Secretary of Albina, testified that normally Albina's repair work on Luckenbach ships was verbally authorized by Sterling or his assistant, and that there was no limitation on the size of the jobs that were authorized orally by Mr. Sterling (R. 587).

With respect to the specific repairs involved in this litigation, it appears that Sterling orally ordered both the removal of a section of the fire line, and the repair of a ladder in No. 5 hold (R. 315, 316, 487). It seems inescapable that as the Luckenbach representative responsible for seeing that necessary repairs were made to the vessel when she came into port, Sterling was also chargeable with responsibility for seeing that an alternate source of water was made available for the ship's fire system, when a section of the fire main was removed.

It appears from Sterling's own testimony that he was informed of the effect of removal of the section of fire line and was aware that the fire system could have been maintained in an operable condition by connecting a hose from a shoreside hydrant (R. 321-323). Apparently, Sterling's only attempt to discharge his responsibility in this regard was to ask the chief engineer if he could handle the situation and to rely wholly on the chief engineer's assurance that he would do so (R. 321-323). It appears that Sterling did not concern himself with this

important safety measure otherwise than as just indicated; indeed, he testified that he didn't feel that there was any further responsibility encumbent [sic] upon him in this regard (R. 328).

It is submitted that a reasonably prudent man in Sterling's position would have taken some further steps to see that the alternate connection to the fire system had actually been made. In this connection, it is to be observed that Sterling was aboard the ship until, in his own words, "about a quarter to 4:00" (R. 317). It appears that the removal of the fire main had been completed no later than 3:00 p.m. (R. 434; 521). The evidence also shows that the coupling, where a hose to supply water from a shore hydrant to the ship's fire line might have been connected, was almost directly at the gangplank going ashore (R. 512). Thus, it appears that in leaving the ship, Sterling must have walked right by the very fittings where by a quick glance he could have determined whether or not the shore connection to the fire line had been made (R. 518). Either he failed to make such observation,* or, observing that the connection had not been made, failed to do anything to remedy the situation. In either event, he was clearly derelict in discharging his responsibility to see that the ship's fire line was supplied with water while the section of the fire main was removed.

As to Radovich, Luckenbach's Marine Superintendent, the Court found that he was a mere subordinate employee and was not a managerial officer (Finding VI,

*See *Verbeeck v. Black Diamond SS Corp.* (CA 2, 1959), 269 F. 2d 68, 71, where it is said that "Liability may not be avoided [under the Fire Statute] by speculation as to the extent to which the officers of the managing company kept themselves in ignorance of its business."

R. 88). Such findings are wholly unsupported by the evidence. The Court further found, with respect to Radovich, that "his functions were confined to Luckenbach's dock in Portland, where he arranged for the loading or discharge of cargo. He reported to his superiors in the Portland uptown office. He had nothing to do with repairs." (Finding VI, R. 88.)

It is true that Radovich's duties included the arranging for loading and discharging cargo,* but the Court's findings that his functions were confined to the Luckenbach dock and that he reported to superiors in the Portland uptown office are not substantiated by one shred of evidence.

The only evidence with respect to Radovich's duties is to be found in his own testimony and in the testimony of Albina's personnel as to their dealings with him. Radovich testified as follows (R. 214):

> "Q. And what, specifically, do the duties entail, with respect to Marine Superintendent?
>
> "A. It entails the hiring, the supervising of personnel, dealing with the loading and discharging of cargo, and in part, as liaison between the ship and our offices in various ports, and in Portland specifically.
>
> "Q. Do you have any association with repairs to be effected by contractors or otherwise?
>
> "A. No, I don't."

Radovich also testified to the effect that he was aboard the S.S. Robert Luckenbach numerous times on the day

*A shipowner's representative who is responsible for supervising the loading of cargo is a managerial officer or agent, for purposes of the Fire Statute. *Williams S.S. Co. v. Wilbur* (CCA 9, 1925) 9 F. 2d 622.

of the fire, because he had to observe the loading and discharging of cargo which was his specific function (R. 215).

Radovich's testimony, quoted above, to the effect that he had no association with repairs to be effected by contractors, is possibly misleading. As will be seen, other evidence indicated that although perhaps he did not have the responsibility of determining what repairs were to be made, he did have the responsibility of coordinating the loading and discharge of cargo with the activities of repair crews.

In the course of explaining his activities when he reboarded the ship at five or ten minutes after six on the day of the fire, Radovich mentioned going to No. 2 hatch and climbing down to the lower 'tween deck to the top of the deep tanks. He mentioned a critical problem with respect to the discharge of cargo from those deep tanks. When the Coast Guard Investigating Officer asked Radovich to explain the nature of the critical problem relative to the deep tanks, his answer was as follows:

> "We had—I was directed to attempt to have the deep tanks discharged of cargo and cleaned relative to some ship repair work to be done in the lower 'tween deck of number two hatch. We had made arrangements that we would attempt to have it ready by eight a.m. in the morning, and I had to determine whether or not it would be required to relieve that longshore gang between twelve and one a.m., to facilitate getting the cargo discharged and the hatch cleaned up as he wished it to be." (R. 216.)

This explanation of one of his problems shows that Radovich's duties included the coordination of cargo dis-

charge with the performance of ship repairs, a conclusion further supported by the testimony of Richard Brewer, one of Albina's Superintendents. Brewer testified as follows (R. 495):

> "Q. In connection with the doing of the work in the hold of the ship and where it is necessary to remove cargo, who in the past, when you were working on the Luckenbach ships, arranged for the removal of cargo?
>
> "A. Well, that would be arranged through Mr. Radovich."

The same witness also testified, in response to questions about Radovich's authority with respect to repairs that:

> "We frequently looked to him as to the time that we could do them. I mean it was up to him when the space would be available." (R. 504.)

It is inescapable that since Radovich's general duties included arranging for the discharge of cargo from holds where repairs were to be performed and specifying the times when space would be available for repair work, it was his specific duty on the occasion in question to see that cargo was removed from No. 5 hold to permit welding to be done there. Indeed, he expressly undertook to do so (R. 491, 495, 498).

Radovich not only knew that repairs involving welding were to be performed in No. 5 hold between 6:00 and 7:00 p.m. and that it was the forward ladder where this work was to be done, he expressly ordered the work to be done at that time (R. 502, 503). However, when Albina's welding crew arrived to repair the ladder in No. 5 hold, there was cargo consisting of burlap and construc-

tion paper in the forward part of the hold within two to four feet of the ladder itself (Agreed Facts, R. 53). It is obvious that Radovich failed to properly discharge his duty to see that the cargo was safely removed from the area where he knew welding was to be performed. Had he done so, there would have been no flammable burlap, construction paper, or other cargo within the area of the welding operations, and there would have been no fire in the first instance.

It is submitted that clearly Sterling and Radovich were both managing officers or agents within the meaning of the Fire Statute, and that the negligence of both contributed to the loss sustained by the libelants. Had Radovich seen to it that the flammable cargo was removed from the area forward of the forward ladder, there would have been no fire at all. Had Sterling seen to it that an alternate source of water was connected to the ship's fire line, after removal of a section of the fire main, the damage to cargo would have been minimal, and there would have been no damage whatever to the ship.

The District Court said (Opinion, R. 82) that "* * * the burden is on the libelant to prove that the neglect of the owner did cause the fire." This, it is submitted, is erroneous. See *Verbeeck v. Black Diamond* (CA 2, 1959), 269 F. 2d 68, 71, where it was held that once negligence had been shown, the burden of proof of coming within the exemption from liability of the Fire Statute is on the owner. The opinion in the *Verbeeck* case was, on rehearing, vacated and the cause remanded for further findings, but it is apparent that the later

opinion did not undertake to reverse the holding as to burden of proof. 273 F. 2d 61, 63.

See also Gilmore and Black, The Law of Admiralty (1957), pp. 705, 706, n. 106, where it is urged that both under the Limitation Act and under the Fire Statute the libelant has the burden of proving negligence, but the shipowner has the burden of proving the absence of privity or knowledge. The authors cite *The Arthur N. Herron* [In re American Dredging Co.] (CA 3, 1956), 235 F. 2d 618, in support of their position but concede that some cases (such as those cited by the District Court herein, R. 82) support a contrary view, but point out that such decisions are doubtless prompted by a confusion of terms. They conclude: "It is believed that the rule should be as in the limitation cases: burden on the libellant to show negligence or fault; burden on the owner to show his (personal) freedom from 'design or neglect.' No doubt the conjunction of the terms 'neglect' and 'negligence' has stimulated the suggestion that in fire statute cases the libellant bears the burden on both aspects of the case."

Here, the evidence is abundant that negligence on the part of Luckenbach's personnel caused or contributed to the start and the spread of the fire. The burden was then on Luckenbach to show, if it could, that none of its negligent employees were managerial officers or agents within the meaning of the Fire Statute. There was no such showing made. On the contrary, the evidence adduced affirmatively shows that both Sterling and Radovich *were* such managerial officers or agents.

It is Albina's position that even if it is held to share responsibility for the start of the fire, the record here is sufficient to show that its conduct was in no event responsible for any loss greater than the value of the burlap bags and construction paper which were stowed forward of the forward ladder in No. 5 hold (Agreed Facts, R. 53). The uncontradicted testimony of Larson, the welder who stayed in the hold to handle the fire hose after the fire broke out, was that up to the time he left the hold after waiting futilely some six minutes for water to come through the hose, the fire was still confined to a relatively small area in the cargo of burlap (see Statement of Case, supra, pp. 12, 13). His testimony that he could have put the fire out had he had water in the hose is substantiated by the testimony of Assistant Chief Kenneth Post of the Portland Fire Department, who testified, in part, as follows:

> "Q. * * * Now, in your experience in fighting fires —combatting fires—have you not found that earliest application of fire-fighting methods to a fire is normally the most effective?
>
> "A. Oh, yes.
>
> "Q. Such as minimizing damage?
>
> "A. Yes, you can put a fire out with a bucket, usually, if you can get to them to start with.
>
> "Q. So, in other words, in this particular case, had water been able to be applied even earlier than your arrival, you feel that the extent of the fire would have been lessened considerably?
>
> "A. Yes. I don't know how the fire started, but it couldn't have started very big—you could put it out with pretty near anything. Surely a small hose line would have put it out when it started." (R. 407.)

Thus, it appears certain that had there been water

available on the ship's fire line, damage would have been limited to a part of the cargo of burlap. However, even assuming that the cargo of construction paper on top of the burlap would have been damaged from fire, smoke or water, the value of that cargo together with the burlap would constitute the limit of Albina's liability. All further damage to cargo, and the entire damage to the ship, was caused by Luckenbach's failure to provide water on the fire line.

If Luckenbach disagrees as to what part of the damage is attributable to its neglect, it was incumbent upon Luckenbach to show what part of the damage was attributable to some other cause. In the absence of such showing, then Luckenbach, as between it and the libelants, is responsible for the entire loss.

Attention is invited to the recent decision of this Court in *American Mail Line, Ltd. v. Tokyo Marine & Fire Insurance Co.* (CA 9, 1959), 270 F. 2d. 499. In that case, cargo interests filed a libel to recover the value of non-delivered cargo, consisting of bulk barley which was destroyed by fire aboard ship. The shipowner set up the Fire Statute and the Carriage of Goods by Sea Act as defenses and filed a cross-libel to recover the ship's share of general average. The trial court found and this Court agreed that the fire started as the proximate result of negligence by the officers and the crew and that the neglect of the shipowner's port captain, after the vessel reached port, caused the fire to spread and additional cargo to be damaged or destroyed. A decree in favor of libelant for the full amount of the loss and dismissing the cross-libel for general average contribution was affirmed.

As to the shipowner's defenses based on the Fire Statute and upon the Carriage of Goods by Sea Act, this Court said:

> "* * * The carrier is not being held liable for damage caused by the onset of fire and destruction caused thereby. The fire was started because of the negligence of the officers and crew of the ship. The carrier was not in privity with the officers and crew and cannot be held liable for their default in starting the fire. However, it is the duty of the carrier to use reasonable precaution to protect cargo from any type damage. The findings of the trial court, which we have confirmed, show that the carrier failed to use reasonable precaution and to take the measures which a reasonably prudent person would have taken to control the fire after it knew or should have known of the existence thereof in No. 1 hold. *This duty exists irrespective of who was primarily responsible for the setting of the fire.*
>
> "Tokyo Marine carried its burden and thus established the negligent failure to take proper precautions to stop a fire which had already been set. Unquestionably, damage has resulted proximately from this negligence. It was incumbent upon the carrier to prove affirmatively any factor or substance which tended to minimize the damage. Inasmuch as there was no way of telling how much of the damage was caused before the Port Captain was notified, it is not unreasonable to assess the whole amount against the carrier. If the Port Captain had acted with reasonable promptitude, the carrier would have been exonerated and no question as to the amount of damage would have arisen, for there would have then been no liability. In view of the situation and the findings of the trial court, there is no defense available to the carrier based upon either of the statutes quoted." (270 F. 2d 501, 502, emphasis added.)

The District Court attempted to distinguish the above

case on the basis that there the negligence of the managing agents occurred after the fire had started, while in the instant case there was no showing of any negligence by anyone after the fire had started (R. 83, 84). It is submitted, however, that this is a difference without a distinction. In the instant case, overlooking for the moment Radovich's negligence in failing to remove the cargo as a proximate cause of the fire starting, Sterling's negligence in failing to see that there was water available on the ship's fire line assuredly caused the fire to spread and greatly increased the extent of the damage. His negligence directly and proximately caused the damage to be much greater than would have been the case if there had been water on the fire line, just as the carrier's negligence in *American Mail Line,* supra, increased the extent of the damage in that case. Sterling's negligence, which preceded the outbreak of the fire but which took effect afterwards so as to render impossible the prompt extinguishment of the fire, can be no less culpable, in contemplation of law, than the owner's negligence in *American Mail Line* where the negligence both occurred and took effect after the fire had started.

Other decisions supporting the proposition that where a shipowner fails to affirmatively show what part of damage sustained by cargo resulted from causes for which the shipowner is not legally responsible, the shipowner is held for the entire loss, include *Schnell v. The Vallescura,* 293 U.S. 296, 79 L. Ed. 373 (1934); *Great A. & P. Tea Company v. Lloyd Brasileiro* (CCA 2, 1947), 159 F. 2d 661, cert. den. 331 U.S. 836, 91 L. Ed. 1849; *Bunge Corporation v. Alcoa Steamship Co.* (D.C.N.Y., 1955), 133 F. Supp. 311.

To summarize with respect to the Fire Statute, Radovich's failure to have the flammable burlap removed from the area where he knew welding was to be performed constituted neglect of the owner within the meaning of the Fire Statute, and was a proximate cause of the commencement of the fire, regardless of whether or not Albina's conduct also amounted to negligence. Further, Sterling's negligence in failing to see that an alternate source of water was connected to the ship's fire line after a section of the main had been removed was also neglect of the owner within the meaning of the Fire Statute.

Since Luckenbach's failure to remove the burlap from the hold before the welding started was neglect of the owner which constituted a contributing cause of the fire in the first instance, it appears that Luckenbach is liable to cargo for the full amount of the damage, regardless of whether Albina is or is not also liable for any of the loss sustained by cargo. Even if no "neglect of the owner" contributed to the start of the fire, Luckenbach might escape liability for the damage to the burlap and construction paper but would still be liable for the damage to all other cargo, in that Sterling, clearly a managerial officer within the meaning of the Fire Statute, failed to take proper steps to insure that a fire could be promptly extinguished once it started.

If the Court cannot from the evidence determine what part of the loss can be attributed to the failure of the fire line, Luckenbach must be liable to cargo for the full amount of the damage under the doctrine of the *American Mail Line* case, and the other cases cited above.

Hence, the Fire Statute is not applicable and the Court erred in holding that Luckenbach is not liable to libelants.

III.

The District Court Erred in Holding that Negligence by Albina Was the Sole Proximate Cause of Damage Sustained by Libelants and by Luckenbach.

A. *Luckenbach was Negligent in Failing to Remove Cargo.*

The facts with respect to Luckenbach's direction that the welding was to be performed on the forward ladder in No. 5 hold between 6:00 and 7:00 p.m., Radovich's duty to remove the flammable cargo from that area if it was likely to create a hazard with respect to the welding, and Luckenbach's failure to so remove the cargo have been discussed above.

It should suffice to state here that if Albina was negligent in welding in close proximity to this cargo, as found by the District Court (Opinion, R. 77, 78), Luckenbach was at least equally at fault in failing to remove the cargo from an area where it ordered that welding be done. Clearly, if the presence of the cargo created a hazard, it was the responsibility of Luckenbach, not Albina, to remove the cargo. Short of actually refusing to proceed with the work as directed, there was nothing Albina could do about the presence of the cargo but to accept it as an existing condition and to proceed with the work, taking such precautions as were considered necessary.

B. *Luckenbach Was Negligent in Failing to Supply Water on the Ship's Fire Line.*

Luckenbach's failure to provide an alternate source of water for the ship's fire line, after ordering removal of a section of the fire main, has also been discussed above.

However, it should be here noted that, regardless of whether Luckenbach's failure in this regard is to be deemed "neglect of the owner" within the meaning of the Fire Statute, such failure was neglect either of the owner or of the vessel's crew, and clearly was a contributing cause to the damage, since it is clear that any damage would have been minimal had water been available on the ship's fire line.

C. *Luckenbach Was Negligent in Failing to Have Vessel Competently Manned.*

As was pointed out in appellant's Statement (supra, pp. 15, 16), there was, at the time the fire started, no member of the ship's crew aboard who was aware that the vessel was without an operable fire system or how to correct the situation. The circumstances giving rise to this condition present an appalling example of indifference to the need for communication of vital information on the part of the ship's engineering department.

Hebert, the Chief Engineer, who had assured Sterling that he would see that an alternate connection was made to the fire line (supra, p. 14), went ashore between 5:20 and 5:30 without leaving any particular instructions with his subordinates (R. 277). He said his First and Second Assistants were advised that the fire main

system would be out of operation, but that he did not think anyone in the deck department had been so advised (R. 285).

Beutgen, the First Assistant, was aware of the status of the fire line (R. 434), but he went ashore before the fire started (R. 431) and returned after the arrival of the Fire Department (R. 432). He asserted that all of the other engineers were appraised that the fire line was defective and had been temporarily repaired while at sea (R. 435, 436). He also said the Second Assistant knew about the removal of a section of the main, but that he couldn't be sure as to the Third or Junior Third Assistants (R. 437).

Porter, the Second Assistant, testified that he was on watch and in the engine room when the section of fire main was removed, but that he did not witness the actual removal (R. 454), and did not learn of the removal until after the fire (R. 455). In any event, he went off watch at 4:00 p.m. (R. 454) and went ashore as soon as he could get off (R. 462); he did not return to the ship until about 7:20 the next morning (R. 462).

Elixson, the Junior Third Assistant Engineer, was the engineering watch officer on duty from four to midnight, the period during which the fire started (R. 298). He was not aware of any repairs being made to the fire main system (R. 298). He did not discover that a section of the fire main was missing until the firemen had arrived and had water in the hold (R. 300).

The Third Assistant Engineer did not testify, and there is no evidence as to his whereabouts when the fire broke out.

As to the deck officers, Captain Maitland testified (R. 204) that he had no knowledge of any repairs to the fire main system, as did Jansen, the Chief Officer (R. 341). Both of these officers were ashore when the fire started (R. 206, 341).

Protic, the Junior Third Mate, was watch officer when the fire broke out (R. 233). He had not been apprised of any repairs being effected when he went on watch (R. 234), and so far as he was aware they were "a live ship" and all facilities including the fire system were available (R. 235).

Kand, the Third Mate, was aboard ship when the fire broke out (R. 252, 253), but it is obvious from his description of efforts to utilize the ship's fire hose that he was not aware that the fire system was inoperative (R. 255-261). The Second Mate did not testify, and there is no evidence indicating that he had any knowledge as to the status of the fire main system.

There is no need to determine here which of these various officers, as between themselves, was most responsible for the ensuing disaster. None of those who had knowledge that a section of fire main had been removed were aboard the ship when such knowledge was needed; none of those who were aboard had such knowledge. Surely such a condition could not arise except through negligence on the part of some one or more of them in failing to communicate this knowledge to the officers on watch, together with any necessary instructions as to how water could be supplied to the fire system if needed.

D. *Luckenbach Was Guilty of Statutory Fault, Although Albina Was Not.*

THE CITY ORDINANCE

It appears that Luckenbach was in violation of various Coast Guard regulations which were applicable to the owners and operators of vessels but which were not applicable to repair contractors such as Albina. These violations will be discussed below.

First, however, it is to be noted that the District Court erred in holding (R. 79) that § 16-2527 of the Police Code of the City of Portland could constitutionally be applied here, against either Luckenbach or Albina, and that there is no conflict between such ordinance and applicable Federal statutes and regulations. This ordinance, a copy of which was admitted in evidence as Libelants' Exhibit No. 4 (R. 105), over Albina's objection (R. 103), provides as follows:

> "*Section* 16-2527. *Burning and Welding.* When any welding or burning is in progress, on any vessel, a suitable fire hose, with nozzle attached, shall be connected with a nearby fire hydrant and a test must be made, before any such welding or burning commences and occasionally while it is still in progress and said hose shall remain, ready for instant use, at least for one hour after any such welding or burning has been completed. A test must be made from time to time during the progress of any such operations. A competent attendant, equipped with not less than one, four pound, CO2 fire extinguisher, at hand and ready for instant use, shall be on hand and ready to act during each such welding or burning operation. If during any such operation, there will be a transmission of heat, through a bulkhead or above or below a deck where any such work is being done, a fire

watch shall be maintained on both sides of the bulkhead or deck. Special attention shall be given where any such operations take place, near a refrigerator compartment or ventilator from any gaseous hold or compartment."

Counsel for cargo contended (R. 104) and the District Court apparently agreed (Opinion, R. 79) that the validity of the ordinance is established by 46 C.F.R., § 146.01-12, which provides as follows:

"Nothing in the regulations in this sub-chapter shall be construed as preventing the enforcement of reasonable local regulations, now in effect or hereafter adopted, when such regulations are not inconsistent or in conflict with the provisions of the regulations in this part."

Albina has no quarrel with the policy expressed in the above regulation, which is merely a condification of the long-recognized admiralty rule that states or municipalities may enact local maritime regulations with respect to such matters as moorage, where not in conflict with recognized maritime principles or federal statutes. *United States v. St. Louis & M.V. Transp. Co.,* 184 U.S. 247, 255, 46 L. Ed. 520 (1902); *The James Gray v. The John Fraser,* 62 U.S. (21 How.) 184, 16 L. Ed. 106 (1859); *The S.S. New York v. Rae,* 59 U.S. (18 How.) 223, 15 L. Ed. 359 (1856); *The Vera* (D.C. Mass., 1914), 224 F. 998; *The Nettie Sundberg* (D.C. Calif., 1900), 100 Fed. 886.

The mere statement of that principle, however, either as established by the above cases or as codified in 46 C.F.R., § 146.01-12, supra, tells us nothing with regard to whether the Portland city ordinance in question is rea-

sonable, or whether it is inconsistent or in conflict with recognized maritime principles, or federal statutes or regulations. See *E. I. DuPont DeNemours & Co. v. Board of Standards, etc., of The City of New York,* 158 NYS 2d 456, 5 Misc. 2d 100 (1956).

A guide to the factors determinative of whether such a local regulation is to be deemed invalid as repugnant to federal enactments is to be found in *Kelly v. State of Washington ex rel Foss,* 302 U.S. 1, 82 L. Ed. 3 (1937). In that case, the U.S. Supreme Court upheld a statute of the State of Washington, relating to inspection, regulation and licensing of motor vessels, upon the theory that the state enactment did not conflict with any federal enactments. The court said (302 U.S. at p. 15):

> "If, however, the State goes further and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule. Whether the State in a particular matter goes too far must be left to be determined when the precise question arises."

There can be little doubt that the ordinance in question does attempt "to impose particular standards as to * * * equipment and operation which * * * may be desirable but pass beyond what is plainly essential to safety and seaworthiness."

The City of Norfolk (CCA 4, 1920), 266 F. 641, cert. den. 253 U.S. 491, 64 L. Ed. 1028, is also instructive.

The Supreme Court held that a vessel moored partly in the channel but not so as to obstruct navigation, could recover full damages from a moving vessel which collided with the anchored vessel, even though a local harbor regulation absolutely prohibited anchoring in the channel. The other relevant facts and the pertinent holding are summarized in the following passage from the court's opinion (266 F. at 644):

> "* * * [The] federal statute allows anchoring in a channel when it does not prevent or obstruct navigation, while the local regulation forbids it. If, while the local rule above quoted was in force, the board of harbor commissioners had made another rule in the terms of the federal statute, obviously the old rule containing the absolute prohibition would have been completely abrogated. Surely the act of Congress on the subject must have the same effect. We hold, therefore, that the local rule is supplanted by the federal statute of 1899."

Similarly, in the instant litigation, federal legislation and regulations promulgated by the Coast Guard (more specifically designated below) permit welding in the hold of a ship, under certain conditions, without having a tested fire hose at hand and without an attendant equipped with a CO2 fire extinguisher. The City of Portland ordinance purports to forbid welding without such equipment and attendant, and similarly, therefore, the local rule is supplanted by the federal regulations.

In the cases cited below state or local enactments were also held invalid as infringing upon areas preempted by federal government: *Omaha Packing Co. v. Pittsburg, F.W. & C. Ry. Co.* (CCA 7, 1941), 120 F. 2d. 594; *Gilvary v. Cuyahoga Valley Ry. Co.,* 292 U.S. 57, 78 L. Ed.

1123 (1934); *United Dredging Co. v. City of Los Angeles* (D.C. Cal. 1926), 10 F. 2d 239, aff'd (CCA 9, 1926), 14 F. 2d 364.

The specific federal statutes and regulations with which the Portland ordinance is in conflict include: 46 U.S.C.A., § 463(a), authorizing the Coast Guard Commandant to prescribe provisions to guard against and extinguish fire on steam vessels; 46 U.S.C.A., § 170(7), directing the Coast Guard Commandant, by regulations, to define explosives or other dangerous articles and to regulate the handling, stowage, etc., of such cargo; 46 C.F.R., part 95 which prescribes detailed requirements for Fire Protection Equipment aboard vessels,* and 46 C.F.R., § 146.02-20 (See Libelants' Ex. 3, admitted in Evidence, R. 103) prohibiting, under designated conditions, repairs or work involving welding or burning aboard vessels.

These federal statutes and regulations impose strin-

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*Albina's Exhibit 41, which was received in evidence (R. 469), lists the Subpart headings under 46 C.F.R., part 95, the purpose being to indicate, in part, the scope of federal regulations in this field. These subpart headings are as follows:

Subpart 95.01—Application [to all vessels except as specificially noted].

Subpart 95.05—Fire Detecting and Extinguishing Equipment, Where Required.

Subpart 95.10—Fire Main System, Details.

Subpart 95.13—Steam Smothering System, Details.

Subpart 95.15—Carbon Dioxide Extinguishing Systems, Details.

Subpart 95.17—Foam Extinguishing Systems, Details.

Subpart 95.20—Water Spray Extinguishing System, Details.

Subpart 95.50—Hand-portable Fire Extinguisher and Semi-portable Fire Extinguishing Systems, Arrangements and Details.

Subpart 95.60—Fire Axes.

gent and detailed requirements as to fire prevention and extinguishment aboard vessels, and define certain conditions under which welding may and may not be performed on vessels. No federal statute or regulation requires that during welding aboard vessels an operable and tested fire hose be near at hand, or that an attendant equipped with a CO2 fire extinguisher be on hand; nor does any federal statute or regulation prohibit welding in the absence of such equipment or attendant.

Thus, it is clear that the city ordinance imposes burdens in addition to those imposed by the federal authorities. It is difficult to conceive a situation where it would be any more obvious that federal authorities have occupied a particular field, in which they have imposed specific standards and requirements, and where local authorities have attempted to impose additional standards and requirements within the same field.

It should also be observed that this is an area in which the uniformity of the maritime law should not be impaired by varying local regulations; in cases involving a subject which demands uniformity of regulation, state or local legislation is prohibited, even in the absence of conflict with an express federal enactment. *Kelly v. State of Washington ex rel Foss,* supra, 302 U.S. 1, 9, 82 L. Ed. 3, 10. It is common knowledge that welding aboard vessels to effect voyage repairs is a frequent and necessary practice; many ships carry their own welding equipment so that the crew may accomplish such repairs even while at sea, if necessary. It is not improbable that a single ship might require repairs involving welding at several ports

of call during the course of a single voyage. Under these circumstances, uniform federal regulation of the conditions under which welding may be performed on vessels is essential; to allow local authorities to impose additional and varying regulations in every port would impose an insufferable burden upon maritime commerce.

Further, it should be observed that strict compliance with the terms of the ordinance would not, so far as appears, have prevented the fire. The immediate presence of a tested fire hose, or of an attendant equipped with a CO_2 fire extinguisher might have made it possible to extinguish the fire sooner, but would have had no tendency whatever to prevent sparks or molten material from igniting the burlap. Thus, the District Court erred in finding [Finding XIII, R. 90] that if various precautions, including compliance with the ordinance, had been taken there would have been no fire.

Hence, the city ordinance under discussion can have no application to this case, and neither Luckenbach nor Albina can be held to be negligent by reason of any violation of such ordinance.

Coast Guard Regulations

The District Court indicated that it believed Albina to be negligent by reason of violation of 46 C.F.R., § 142.02-20, prohibiting repairs involving welding or burning in holds containing dangerous articles (R. 78,79). The court also rejected, without explanation of its reasoning, Albina's contention that such regulation is not applicable to a repair contractor working aboard a vessel (R. 79).

The applicability of this Coast Guard regulation is governed by 46 C.F.R., §§ 146.02-2 to 146.02-5, as set forth in Albina's Exhibit 43 (admitted in evidence, R. 470). The regulations in subchapter 146.02, Code of Federal Regulations, Title 46, are expressly made applicable to vessels (46 C.F.R., § 146.02-2), to shippers of explosives or other dangerous articles or substances (46 C.F.R., § 146.02-3), and are declared to be binding upon certain other persons, namely, owners, charterers, agents, masters, or persons in charge of vessels, and upon all other persons transporting, carrying, conveying, handling, storing or stowing explosives or other dangerous articles or substances on board vessels (46 C.F.R., § 146.02-4). The applicability of these regulations is not extended to repair contractors, or to any other category of persons which might be deemed to include Albina.

Since it appears that violation of such regulation is punishable by fine or imprisonment, pursuant to 46 USCA § 170 (14) and (15), the regulation is to be deemed penal in nature, and should not be expansively interpreted so as to apply to persons or situations not clearly within its purview. *McHoney v. Marine Navigation Co.* (CA 4, 1956), 233 F. 2d 769.

If 46 C.F.R., § 146.02-20, has any application at all to this case, it was applicable only to Luckenbach as the owner and person in charge of a vessel, and perhaps as a person transporting dangerous articles or substances. Since this regulation was not applicable to Albina in the first instance, Albina could not be deemed negligent by virtue of any noncompliance with its terms.

Since the District Court found that Albina was negligent, among other particulars, under libelants' specification of negligence No. 8 (Opinion, R. 79; Consolidated Pretrial Order, R. 60), it should be noted that such specification of negligence charges Albina with welding in a hold of the vessel containing cargo classified as dangerous. It should be observed that the Coast Guard's classification of various substances including burlap as hazardous articles (46 C.F.R., subchapter 146.27) is not binding upon Albina.

46 C.F.R., § 146.27-1 defines a hazardous article, for purposes of the regulations in that subchapter, as any article or substance having specified characteristics of flammability, or which are specifically named as hazardous, and declares that "this definition is binding upon all shippers making shipments of hazardous articles by any vessel and shall apply to owners, charterers, agents, master or other person in charge of a vessel, and to other persons transporting, carrying, conveying, storing, stowing or using hazardous articles on board vessels subject to R.S. 4472, as amended, and the regulations in this subchapter." Thus, since the regulations classifying various articles as hazardous expressly specify the persons upon whom such classification is binding, and since Albina does not fall within any of the categories of persons upon whom such classification is declared to be binding, it was erroneous to hold Albina negligent by reason of the classification of burlap as a hazardous article. See *McHoney v. Marine Navigation Co.*, supra, 233 F. 2d 769.

Luckenbach, however, would be bound by such classification as the owner or person in charge of a vessel, and

as a person transporting hazardous articles on board a vessel.

Thus, neither Luckenbach nor Albina may be deemed negligent by reason of any violation of the Portland city ordinance, since such ordinance can have no valid application to this case. Luckenbach is negligent per se for violation of some one or more of the various Coast Guard regulations restricting repair work involving welding in cargo holds where dangerous articles are stowed. Inasmuch as those regulations are not applicable to repair contractors, Albina cannot be deemed negligent per se by reason of any violation of any such regulations.

E. *The Vessel Was Unseaworthy.*

Libelants had the benefit of a warranty that the vessel on which their goods were carried was free from any unseaworthy condition which might arise through the default or privity of her owners. The question as to Albina's right to rely upon a warranty of seaworthiness is more fully discussed later in this brief (infra, pp. 72-75).

Appellant desires to here point out merely that the record clearly establishes that, at the time the fire broke out, the vessel was in fact unseaworthy in at least three particulars.

First, it would appear that the presence of flammable cargo within two to four feet of a ladder which was to be repaired by welding created a hazardous and unseaworthy condition.* As has been pointed out above, the

*Improperly stowed cargo renders a ship unseaworthy, as to either an injured worker or a cargo shipper. *Gindville v. American Hawaiian*

presence of this cargo must be attributed to the neglect of Radovich, a managerial officer or agent, and hence this condition is to be regarded as having arisen through the lack of due diligence by the owner.

Second, the inoperable condition of the ship's fire line was certainly an unseaworthy condition; a ship with inoperable fire-fighting equipment can scarcely be considered "reasonably fit to carry the cargo." *The Silvia,* 171 U.S. 462, 464, 43 L. Ed. 241 (1898); *Martin v. The Southwark,* 191 U.S. 1, 9, 48 L. Ed. 65 (1903). Inasmuch as this condition arose through the failure of Sterling, a managerial officer or agent, to see that an alternate source of water was connected to the fire line, it was due to the lack of due diligence by the owner.

Third, as has been mentioned above (see Statement, supra, pp. 15, 16), it appears that at the time the fire broke out there was no member of the ship's crew aboard who was aware that the main fire line was inoperable. The absence of any officer or member of the crew who knew that there was no water in the fire line, or why such condition existed, or how to remedy the condition rendered the vessel unseaworthy (see libelants' Contention II-2, Consolidated Pretrial Order, R. 57; Albina's Contention I-2, Consolidated Pretrial Order, R. 66, 67).*

S.S. Co. (CA 3, 1955) 224 F. 2d 746; *Palazzolo v. Pan-Atlantic S.S. Corp.* (CA 2, 1954) 211 F. 2d 277, aff'd sub nom; *Ryan S. Co. v. Pan-Atlantic,* 349 U.S. 901, 99 L. Ed. 1239; *Pioneer Import Co. v. The Lafcomo* (CCA 2, 1943) 138 F. 2d 907, cert. den. 321 U.S. 766, 88 L. Ed. 1063.

*For a vessel to be seaworthy, it must be manned by a generally competent master and crew, i.e., a crew competent to meet the exigencies of the voyage. *Boudoin v. Lykes Bros.,* 348 U.S. 336, 99 L. Ed. 354 (1955); *Spellman v. American Barge Line* (CA 3, 1949) 176 F. 2d 716; *The Rolph* (CCA 9, 1924) 299 Fed. 52, cert. den. 266 U.S. 614, 69 L. Ed. 468.

This unseaworthy condition may not be considered as arising through the personal neglect of the owner, precluding libelants from direct recovery against Luckenbach for this particular unseaworthy condition. However, Albina was entitled to a seaworthy vessel, or advice as to any unseaworthiness, and it is immaterial that the condition may have arisen without any lack of due diligence by the owners.

F. *Albina's Negligence.*

Albina was directed to do the welding in No. 5 hold between 6:00 and 7:00 p.m. and had the right to assume that Luckenbach had sufficiently cleared the area at the foot of the ladder of dangerous cargo. The welding crew thereafter employed the usual and customary methods for the prevention of fire. Nevertheless, there was competent evidence sustaining a finding that Albina's failure to take additional precautions proximately contributed to the start of the fire.

However, Albina does not concede that it was grossly negligent (Finding IV, R. 87; Finding XIII, R. 89), and urges that the District Court erred in so holding. Aside from the absence of any issue of gross negligence (see Contentions of parties, R. 56-69), the uncontradicted testimony of Smith, the welding foreman, as to the precautions taken (R. 124-125), and as to his belief that he had eliminated the danger (R. 130) refutes any finding of gross negligence.

Even though Albina's negligence contributed to the start of the fire, Luckenbach was also at fault and Luckenbach was solely at fault for most of the cargo damage

and all of the vessel damage because its fire system was inoperable and no officer or member of the crew knew how to place it in operation.

IV.

The District Court Erred in Holding Albina Liable to Indemnify Luckenbach for Breach of Implied Warranty of Workmanlike Service.

Although the District Court apparently rested its decision solely upon tort (e.g., Finding XIII, R. 89: "The fire was caused solely by the gross negligence of Albina * * *"), the Court found that Luckenbach was entitled to indemnity from Albina for breach of implied warranty of workmanlike service. The Court adopted Finding XV (R. 90) to the effect that Luckenbach had a right to and did rely on Albina to do the welding in a safe and workmanlike manner, and Conclusion III (R. 91) to the effect that even if liable to cargo, Luckenbach would have a right to indemnity from Albina for all sums it might be compelled to pay. The Court alluded to cases in which the owner of a vessel had been held liable to an injured longshoreman, with a right of indemnity over against the injured man's employer, a stevedoring contractor (Opinion, R. 85, 86). The District Court said:

> "I am unable to distinguish the logic or the soundness of the reasoning in the stevedoring cases from what should be the logic and the soundness of the reasoning in arriving at a proper conclusion in this case. The decisions in the stevedore cases control. I see no distinction between liability by way of indemnity and liability by way of direct damage or compensation." (Opinion, R. 86.)

In view of the breach by Luckenbach of its express undertaking to maintain water in its fire lines during the welding operations, there can be no claim to indemnity for most of the cargo damage or any of the vessel damage.

A. *No Liability on the Part of Albina as to Damage to Ship.*

Albina concedes that the evidence justified a finding that it was in some degree at fault with respect to the start of the fire. It does not follow that Albina should indemnify Luckenbach for damage to cargo attributable to its inoperable fire system, for fire damage to the ship, or for consequential damage which Luckenbach may have sustained as a result of the fire.

Any reasonable view of the evidence requires a finding that Luckenbach must assume at least equal responsibility for the start of the fire in that it failed to remove the flammable cargo from the area adjacent to the forward ladder in No. 5 hold, when it had directed welding to be performed there. Aside from that, the evidence clearly shows that had Luckenbach fulfilled its obligation to supply water to the ship's fire line, the fire would have been extinguished before it could have caused any damage to the ship herself (R. 576; see Statement, supra, pp. 12, 13). The damage to the ship was not proximately caused by any negligence of Albina, but by Luckenbach's failure to connect an alternate source of water to the fire line, and by its failure to have the vessel manned with competent personnel who were aware of the condition of the fire line and how to remedy it.

It is pertinent to refer here to the decision in *Southport Transit Company v. Avondale Marine Ways* (CA 5, 1956), 234 F. 2d 947. That was a civil action to recover damages for fire occurring on the plaintiff's tug while it was undergoing repairs on a marine railway in the defendant's shipyard. It was found that the fire started through negligence of the defendant's workmen but that it continued to burn, partly because of the negligence of the workmen of the plaintiff. The District Court found that there was contributory negligence by plaintiff and that this completely barred recovery in a civil action. The Court of Appeals reversed the decision with directions to enter an interlocutory decree for the plaintiff and ordering further proceedings for the apportionment of damages. The reversal was based on alternative grounds: first, that contributory negligence is not a complete bar to recovery in maritime causes of action whether pending as civil actions or in admiralty, and secondly, that properly speaking, the decision was not based on the doctrine of contributory neglignece at all. The Court said (234 F. 2d at 951):

> "* * * Rather it is, or is akin to, the one universally applied for both torts and contracts, generally described as the doctrine of avoidable consequences and under which a plaintiff, with an otherwise valid right of action, is denied recovery for so much of the losses as are shown to have resulted from failure on his part to use reasonable efforts to avoid or prevent them."

The *Southport* case, supra, supports our position that Luckenbach can recover nothing from Albina for so much of Luckenbach's damages as resulted from Luckenbach's

own default in failing to properly control the fire or to provide the means by which it could be controlled. This would include all fire damage to the ship and all of Luckenbach's consequential damages (as well as any amounts the parties are required to pay for loss of cargo other than the burlap and construction paper).

Assuming that Albina was negligent in conducting the welding operation, Albina would be liable for such damage as was reasonably foreseeable as a proximate result of its conduct. Concededly, it was reasonably foreseeable by Albina that if a fire should start as a result of the welding, there would be some damage to the cargo in the immediate area of the forward ladder. However, it was not reasonably foreseeable that Luckenbach would not have a competent crew available for fighting the fire, nor was it foreseeable that water pressure would not be available on the ship's fire line.

Consequently, it was not reasonably foreseeable by Albina that a small fire starting in the cargo of burlap should, by reason of Luckenbach's default, develop into a veritable holocaust, causing extensive damage to cargo in the after part of No. 5 hold, heat and water damage to cargo in No. 4 hold, and damage to the ship herself through heating and buckling of plates. All damage over and above the loss of the burlap and the construction paper must necessarily be considered to have been the proximate result of Luckenbach's failure to establish an alternate water supply system for fire protection purposes and to have a competent crew. Albina is not liable to cargo owners for losses other than that of the burlap

and the construction paper, nor can Albina be under any duty to indemnify Luckenbach for any other losses.

For an application of the foreseeability test in a maritime indemnity case, see *Reddick v. McAllister Lighterage Line* (CA 2, 1958), 258 F. 2d 297, cert. den. 358 U.S. 908, 3 L. Ed. 2d 229. In that case, McAllister owned a lighter; Clark, a stevedoring firm, had loaded the lighter; Reddick, a longshoreman, was employed by Cuba Mail to work in unloading the lighter. The lighter had been in McAllister's exclusive possession and control for two days between the loading by Clark and the unloading by Cuba Mail. In unloading operations, it was found that heavy crates stowed aboard the lighter were so close together that slings could not be put around them. Reddick was sent on top of the crates to pry them apart with a crowbar, to allow the placement of slings. He stepped on an apparently sound crate, one of its boards broke, and he fell over the side, sustaining personal injuries.

On appeal, the trial court's decree was affirmed insofar as it allowed Reddick recovery from McAllister, but McAllister's recovery over from Clark was reversed. The court said that even if Clark breached its implied warranty of workmanlike service by improper stowage, this was not the cause of the injury. It recognized that under *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U.S. 563, 2 L. Ed. 2d 491 (1958), and other cases, tort theories of liability such as "active-passive" or "primary-secondary" are inapplicable when dealing with contractual indemnity problems. The court stated (258 F. 2d at 300):

> "* * * Under the general test of foreseeability applied to contractual liability, the breach must have been the cause of the injury. We think that in this case the latent defect in the board on the top of the crate was an intervening cause which broke any causal chain that might otherwise have existed."

On petition for rehearing, the court further stated (258 F. 2d at 303):

> "The petitioner urges that in exonerating Clark we have disregarded admonitions in [Weyerhaeuser v. Nacirema, supra] and have applied tort principles to the breach of the contract here involved. We do not agree. * * * We think Clark's breach was one which did not make 'the injury foreseeable as more likely to occur * * * and to mulct him * * * does not attain the purpose for which law and remedies exist. * * *' Corbin on Contracts, Vol. 5, p. 61.
>
> "The vastly extended scope of the warranty of seaworthiness under recent Supreme Court decisions has already shifted the stevedore's loss. The humanitarian objective of those decisions will not be furthered by judicial decisions which shift the stevedore's loss from one underwriter to another. And so we leave the loss on McAllister (and its underwriters) being convinced that under the doctrine of causation and foreseeability in the field of contracts that is where the loss belongs. Corbin on Contracts, Vol. 5, section 1006, et seq."

Thus, assuming that Albina was negligent with respect to starting the fire, it is not liable to indemnify Luckenbach for losses sustained by innocent third parties, the cargo, as the result of an intervening cause not reasonably foreseeable by Albina, namely, the failure of the ship's fire-fighting equipment, and the failure of her crew to render such equipment operable.

B. *Albina Cannot Be Required to Indemnify Luckenbach for Any Cargo Damage, in the Absence of Liability of Luckenbach to Libelants.*

It should be observed that to the extent the District Court may have relied on the stevedoring indemnity cases in concluding that Albina was liable for the full amount of the cargo damage (Opinion, R. 85, 86), those cases do not sustain the decision, since the Court concluded that Luckenbach was not liable to libelants for the cargo damage or otherwise (Conclusion II, R. 91).

In the stevedoring indemnity cases, such as those cited by the Court, there can be no liability on the part of the employer to indemnify the vessel or her owners, unless there was liability from the vessel to the injured workman in the first instance. *The Toledo* (CCA 2, 1941), 122 F. 2d 255, cert. den. 314 U.S. 689, 86 L. Ed. 551; *McAndrews v. U. S. Lines Co.* (D.C. N.Y., 1958), 1959 AMC 1575; see also *Donald v. Guy* (D.C. Va., 1903), 127 Fed. 228.

C. *Luckenbach's Conduct Precludes Recovery of Indemnity from Albina on Any Warranty Theory.*

The most compelling reason why Luckenbach cannot be entitled to indemnity from Albina on the basis that the latter breached any implied warranty of workmanlike service is to be found in the very stevedoring indemnity cases cited and relied upon by the District Court.

In *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U.S. 563, 2 L. Ed. 2d 491 (1958), it was held

that a stevedoring company's duty to indemnify a shipowner on account of personal injuries suffered by an employee of the stevedore was based on contract and not on tort. It was also held that in the field of contractual indemnity cases in admiralty law the theories of active versus passive, or primary versus secondary negligence are inappropriate. It was recognized that certain negligent acts by the shipowner could bar it from seeking indemnity from the stevedore, but held that if the ship's only negligence was failure to inspect its equipment, it could recover from the stevedore, assuming the latter to have been guilty of negligence in using the equipment.

Under the reasoning of the *Weyerhaeuser* case, supra, it is to be noted that Luckenbach's negligence in the instant case is not a mere failure to inspect for or discover defective equipment, but rather it is neglect in failing to remove flammable cargo from an area where it had ordered welding to be performed, and flagrant neglect in failing to provide an alternate water supply system (in spite of an express undertaking to do so) when it knew that a section of the fire main had been removed, and in failing to man the vessel, at all times, with competent officers and crew who were aware that the fire main was inoperative and who knew how the situation could be remedied. Thus, it is not believed that the *Weyerhaeuser* case, supra, or any other case, establishes any right of indemnity by Luckenbach against Albina in the instant litigation, even if the personal injury indemnity cases are regarded as controlling.

D. *Personal Injury Indemnity Cases Are Not Controlling.*

The considerations that have caused the courts to allow indemnity over in a suit by a ship against the employer of a longshoreman who recovers damages from the vessel are not present in suits for damages by innocent third persons for injury to cargo. Here, the cargo claimants are seeking recovery for losses sustained by them as a result of fault on the part of Luckenbach or Albina, or both.

In the personal injury cases cited and apparently relied on by the District Court (Opinion, R. 85), the employer was protected by the Longshoremen's and Harbor Workers' Compensation Act against direct suit by the injured employee. The latter, however, had a right of suit against the vessel or the vessel owner for unseaworthiness, and if that unseaworthiness had been caused by the injured man's employer, the vessel was given indemnity over against the employer. In the case at bar, the cargo owners have sued both Luckenbach and Albina directly and either or both may be held liable, if they are shown to have been at fault. If both are at fault, the damages should be assessed against Albina and Luckenbach in proportion to their relative fault. See *Southport Transit Co. v. Avondale Marine Ways,* supra, 234 F. 2d 947.

Even if Albina's sole negligence is determined to have caused the fire, the intervening negligence of Luckenbach is assuredly responsible for the greater portion of the damage to the cargo and for all of the damage sustained by the vessel. In that situation, the Court can determine the extent to which Luckenbach is liable. If the negli-

gence of Luckenbach was a cause of the loss suffered by the cargo, it is not unjust that Luckenbach should bear that loss in proportion to its fault. In this litigation, there is no sound legal or policy reason why Albina should be held responsible for the entire loss, since a consideration of the evidence herein compels the conclusion that regardless of whether or not Albina's conduct amounted to negligence, the neglect of Luckenbach in the various particulars heretofore discussed was at least equally responsible for the loss.

E. *Luckenbach Itself Breached Implied Warranty and Express Undertaking.*

Even if it be assumed, arguendo, that Albina breached an implied warranty of workmanlike service, it would appear that Luckenbach would be precluded from recovery on the basis of such breach by Albina by virtue of Luckenbach's breach, not only of the warranty of seaworthiness, but of its express undertaking with respect to furnishing water on the ship's fire line.

As has been pointed out in the Statement (supra, p. 11), it is clear from the testimony of Sterling, Luckenbach's Marine Superintendent, and from the testimony of the vessel's Chief Engineer, Hebert, and of the First Assistant Engineer, Beutgen, that there was no idea on the part of anyone that Albina was to supply an alternate source of water after the section of fire main was removed. On the contrary, Luckenbach expressly undertook to do so. This express undertaking was made in the presence of Richard Brewer, one of Albina's ship repair Superintendents (R. 489), and under these circum-

stances it is clear that Albina was entitled to rely on such undertaking on the part of Luckenbach. When working aboard a ship, Albina recognized the need for fire protection, and assumed that it was available (R. 497).

Even in the absence of such express undertaking it appears that Albina would be entitled to rely upon Luckenbach's implied warranty that the vessel was seaworthy, except as to the specific defects which Albina's personnel came aboard to remedy.

Mesle v. Kea Steamship Corp. (CA 3, 1958), 260 F. 2d 747, 752, expressly held that the warranty of seaworthiness runs to a shoreside repair worker who goes aboard a vessel for the purpose of remedying a defect other than that which caused his injury. It was there said:

> "* * * Since libelant [a repair yard worker] was not engaged in remedying the very defect which caused his injury, the warranty of seaworthiness of the structure in respects other than that calling for repair continued to run to him. Bruszewski v. Isthmian S.S. Co., supra [163 F. 2d 720], consequently does not control this case."

Pinion v. Mississippi Shipping Co. (D.C. La., 1957), 156 F. Supp. 652, is also illuminating in this regard. In that case, a repairman went aboard a ship to replace a corroded pipe. It was held that there was no warranty of seaworthiness to him as to the pipe, but that there was such a warranty with respect to defective scaffolding which he was required to use in attempting to replace the pipe.

As applied in the instant case, the unseaworthiness which occasioned the damage was not among the defects

which Albina had come aboard to repair. Earlier on the day of the fire, Albina had come aboard to remove and replace a defective section of the fire line. However, it was not the defective condition of the fire main which contributed to the loss; rather, it was the absence of an alternate source of water for the fire main after the section of pipe had been removed. Nor, of course, was the defective ladder in No. 5 hold the cause of the damage.

Thus, it appears that Albina, when it came aboard to repair the ladder, was entitled to rely upon a warranty that the vessel was seaworthy, as to the availability of water on the fire line. Albina should also be entitled to rely upon the vessel's seaworthiness as to competence of the crew with respect to knowledge of the inoperability of the fire line and how it could be remedied.

Appellant is aware that in *Hugev v. Dampskisaktieselskabet International* (D.C. Cal., 1959), 170 F. Supp. 601, aff'd (CA 9, 1960), 274 F. 2d 875, cert. den. 363 U.S. 803, 4 L. Ed. 2d 1147, it was indicated that an implied warranty of seaworthiness does not extend to a stevedoring contractor, as distinguished from the contractor's individual employees. However, a consideration of the rationale of the *Hugev* decision indicates that such denial of the right to rely upon a warranty of seaworthiness is not applicable in the instant case.

In the *Hugev* case, supra, the District Court held and this Court agreed that an expert stevedoring contractor coming aboard a vessel for the purpose of unloading cargo should be aware that the vessel has just completed a long ocean voyage and that there may be a number of "lurking

dangers" aboard the vessel. Here, on the other hand, it appears that the vessel's owner had determined, when she arrived in Portland, that a number of specific repairs were necessary. In effect, the shipowner said to Albina, "We want you to come aboard and repair these particular defects." Under such circumstances, the repair contractor is entitled to rely upon a warranty that the vessel is seaworthy with respect to other conditions. More specifically, the repair contractor is entitled to a vessel free of hazardous conditions created by the owner's neglect after the vessel has reached port.

In any event, in the instant case the question does not depend entirely upon an implied warranty of seaworthiness, inasmuch as Luckenbach expressly undertook to see that water was supplied to the fire line after a section of the main had been removed. Such being the case, it would appear that Luckenbach's contractual breach with respect to the fire line precludes it from recovery on any theory of a breach of implied warranty.

V.

The District Court Erred in Holding that Albina Is Not Entitled to Collect Its Repair Bill.

As has been sufficiently pointed out in preceding portions of this brief, there would have been no physical damage to the vessel whatever, but for the failure of the fire line, and the lack of competence of the ship's crew to remedy that failure of equipment. Since it is Luckenbach, and not Albina, that is chargeable both with the failure of the fire line and with the incompetence of the

crew, it is also Luckenbach and not Albina which should bear the burden of the damage to the vessel. Accordingly, the Court erred in concluding that Albina does not have any right to collect its bill for repairing the fire damage to the ship (Conclusion VI, R. 92).

As was pointed out in the Statement (supra, p. 16), it is admitted that Albina made the repairs at a stated cost of $28,933.89 and that payment has not been made therefor. Luckenbach contended that Albina repaired the fire damage to the ship as a volunteer, and that its conduct in that regard constituted an admission of liability. This was wholly unsubstantiated by the evidence.

The uncontradicted evidence is that the repairs were accomplished on the oral authorization of Luckenbach's Port Engineer, Herbert Sterling, in accordance with the normal course of dealings between Luckenbach and Albina (R. 587-590). Thus, it is established that the repairs were done at Luckenbach's instance and request, and it follows that Albina is entitled to be paid for accomplishing the repairs.

CONCLUSIONS

1. The District Court erred in adopting its Opinion as Findings and Conclusions.

2. The Fire Statute is not applicable, and Luckenbach is liable directly to the libelants.

3. Luckenbach was at fault both with respect to the start and the spread of the fire.

4. In no event can Albina be held liable to libelants

for any damages in excess of the value of the cargo in the forward part of No. 5 hold. All other cargo damage, all damage to the ship, and any consequential damages sustained by Luckenbach were proximately caused by Luckenbach's neglect and the unseaworthy condition of the vessel.

5. Luckenbach's conduct was such as to bar it from any recovery over from Albina of such sums as Luckenbach is required to pay the libelants.

6. No fault of Albina proximately caused any of the damage to the vessel. Luckenbach cannot recover its consequential damages, and Albina is entitled to recover the full amount of its repair bill from Luckenbach.

Respectfully submitted,

KRAUSE, LINDSAY & NAHSTOLL,
GUNTHER F. KRAUSE,
ALAN H. JOHANSEN,
Proctors for Appellant,
Albina Engine & Machine Works, Inc.

APPENDIX

TABLE OF EXHIBITS

[References are to pages of the printed Record.]

Libelants' Exhibits	Exhibit Number	Identified	Offered	Received or Rejected
		[All Exhibits were listed in Pre-trial Order (R. 69, 70), and Parties Stipulated that No further Identification Would be Required (R. 69).]		
	1		101	102
	2		102	468**
	3*		102	103
	4		103	105
	5*		106	108
	6A to 6F		108	109
	7 (A		535	535
	(B		563	566
	26*		109	109
Luckenbach's Exhibits				
	23		112	112
	24*		465	465
	25A & 25B*		465	466
Albina's Exhibits				
	41*		469	469
	42*		469	470
	43*		470	470
	44		470	471
	45		481	482**
	45		593	594

* Transmitted to Clerk of Court of Appeals, but not reproduced in Record.

** Rejected.

No. 17070

United States
COURT OF APPEALS
for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC.,
an Oregon Corporation,

Appellant,

v.

HERSHEY CHOCOLATE CORPORATION,
a Delaware Corporation, et al.,

Appellees.

Upon Appeal from the United States District Court for the District of Oregon.

HONORABLE JOHN F. KILKENNY, Judge.

BRIEF OF APPELLEE LUCKENBACH STEAMSHIP COMPANY, INC. IN REPLY TO APPELLANT

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THE FACTS

These are stated in the Trial Court's Opinion and Supplemental Findings.

APPELLANT'S POINT I

This point, that the Trial Judge should not have adopted his Opinion as a Finding of Fact, is without

merit. Opinions are frequently adopted as Findings of Fact. Appellant does not urge this as a ground for reversal and we say no more about it.

APPELLANT'S POINT II

This point is that the Court erred in holding that Luckenbach was not liable to the libelants. It involves the Fire Statute.

There is only one appellant,—Albina. Hershey Chocolate Corporation and the other cargo owners are satisfied with the Decree below, denying them damages against Luckenbach, and have not appealed.

Appellant devotes much of its argument attempting to show that the Trial Court erred in holding that Luckenbach, because of the Fire Statute, was not liable to libelants, the cargo owners.

We cannot see how this can help Albina. Albina has no concern with the question. It was an issue solely between the cargo and Luckenbach. The cargo owners could have raised it, by appealing, if they had wanted to. But they have not. They are satisfied with the Trial Court's decree, and have not appealed.

Albina is in no position to raise this question. As to Albina, it is a collateral and extraneous issue. And what can it avail Albina? Even if it prevailed on this issue, it could not thus shift its own liability for the fire. And the cargo owners have now chosen to pursue Albina alone.

Since, in our view, this question is moot, we shall not devote too much space to it. But because it has been raised, we cannot ignore it altogether. The Trial Court's Opinion and Findings (R. 72-92) correctly interpret and apply the Fire Statute to exonerate Luckenbach from cargo damage. We rely on that, and now do little more than summarize the guiding principles and apply them.

1. The fire must be *caused* by the neglect of the shipowner.

> "The neglect which will deprive the shipowner of protection is a neglect which caused the fire. The statute expressly so limits it." *The Ida,* 75 F.(2d) 278, 279 (CCA, 2nd Circuit).

2. The fire must have been caused by the *personal* neglect of the shipowner.

> "Since 'neglect of the owner' means his personal negligence, or in case of a corporate owner, negligence of its managing officers and agents as distinguished from that of the master or subordinates," . . . etc. *Consumers Import Co.* v. *Kabushiki Kaisha etc.*, 320 U.S. 249, 252; 88 L. Ed. 30, 32.

In short, there must be privity.

3. The shipowner, i.e., the managerial officer, may delegate matters to be done.

> "The courts have been careful not to thwart the purpose of the Fire Statute by interpreting as 'neglect' of the owners the breach of what in other connections is held to be a non-delegable duty." *Earle & Stoddardt* v. *Ellerman's Wilson Line,* 287 U.S. 420, 427, 77 L. Ed. 403, 407. Also, *Consumers Import Co.* v. *Kabushiki Kaisha, etc,* supra, where the work was "properly delegated." 88 L. Ed. at page 32.

4. There are no conditions attached to application of the Fire Statute, such as obeying Coast Guard Regulations, or making the ship seaworthy, or anything like that.

> "The Fire Statute, in terms, relieves the owners from liability 'unless such fire is caused by the design or neglect of such owner'. The statute makes no other exception from the complete immunity granted." *Earle & Stoddardt* v. *Ellerman's Wilson Line,* supra.

See also *Hoskyn & Co.* v. *Silver Line,* 143 F.(2d) 462.

5. The Pennsylvania Rule does not apply. *Automobile Insurance Co.* v. *United Fruit Co.,* 224 F.(2d) 72, 75.

> "As already stated, the benefit of that statute (the Fire Statute) is not legislatively conditioned upon compliance with the safety act, 46 USCA §463." *Fidelity-Phenix Fire I. Co.* v. *Flota, etc.,* 205 F.(2d) 886, 888.

6. Since the Fire Statute is a statute of exoneration and not of limitation, it differs from the limitation statute in putting the burden of proof throughout on the cargo owner to show: That the fire was caused by negligence of the shipowner; and that the causer of the fire was a managerial officer; that through such officer the shipowner was privy to the cause of the fire. Judge Roche has stated the law succinctly:

> "To deprive the owner of the benefit of this statute, the claimant must prove (1) the cause of the fire, (2) the existence of design or negligence, and (3) that such design or negligence was that of the owner himself or his managing agent." *Connell Bros. Co.*

v. *Sevenseas Trading & Steamship Co.*, 111 F. Supp. 227, 229.

To the same effect are:

The Strathdone, 89 Fed. 374.
Hoskyn & Co. v. Silver Line, 143 F.(2d) 462.
Fidelity-Phenix Fire I. Co. v. Flota Mercante Del Estado, 205 F.(2d) 886.
The Cabo Hatteras, 5 F. Supp. 725.

Opposed to this, appellant, on pages 40 and 41 of its Brief, cites *Verbeeck* v. *Black Diamond* (CA 2, 1959), 269 F.(2d) 68, and Gilmore and Black. The statement in the *Verbeeck* v. *Black Diamond* case is erroneous. It cites Gilmore and Black, not perceiving that Gilmore and Black, in their footnote, were not stating what the law is on burden of proof, but only what they, the authors, think it *ought* to be. For a discussion of this, see the article in the Appendix to this Brief. Fortunately, the *Verbeeck* opinion was vacated, and the previous erroneous statement of law was expressly repudiated. It is so stated in the majority opinion, and pointed out in Judge Clark's dissent. 273 F.(2d) 61.

Applying these principles, the only person who could possibly be deemed a managerial officer was Sterling. And it is plain as day that he did not *"cause"* the fire. It was *caused* by Albina. Not only that, but Sterling did not even know that the welding was to take place on the forward ladder in No. 5 hold. He had given orders to repair the after ladder in that hold, after it had been cleared of cargo, and then left the ship. If the work had been done at the after ladder there could not possibly have been a fire because the only

cargo there was metal conduit, and it had already been removed. Albina's welders, learning that the missing rung was on the forward ladder, proceeded without instructions, and accepting the conditions there, to weld that ladder, with the resultant fire.

Neither can the omission in the fire line be attributed to Sterling. He had delegated to the chief engineer the handling of this and substituting an adequate water supply, as he had a right to do. *Earle & Stoddardt* v. *Ellerman's Wilson Line*, supra; *Consumers Import Co.* v. *Kabushiki Kaisha, etc.,* supra. See also same case below sub nom *"Venice Maru,"* 39 F. Supp. 349.

He left the ship about 3:00 o'clock P.M. (R. 317), about the time the pipe was being removed (R. 434).

Furthermore, it is no prerequisite to the Fire Statute that the ship be seaworthy. *Earle & Stoddardt,* supra.

It is impossible, under any view, to connect Sterling with the fire.

Radovich was a very minor employee (Finding VI). He was a dock foreman with the high sounding and flattering title of "Marine Superintendent," but whose sole function was hiring longshore gangs and attending to the loading and discharge of cargo (R. 214), and acting as liaison man between the dock and his superiors in the uptown office (R. 214, 220). He had nothing whatever to do with repairs (R. 214, Finding X). His sole relation thereto was to clear cargo, *when requested* and *to the extent requested,* away from repair-work, and have the longshoremen out of the hold.

It is said in Appellant's Brief, p. 39, that Radovich "expressly ordered the work to be done at that time" on the forward ladder. This is not true. All he did was to inform Brewer of Albina that it was the forward, not the after, ladder that was in need of repair, and that between 6:00 and 7:00, the longshoremen would be out of the hold. He gave no orders for the repair, nor any instructions, nor had he any authority to do so. Here is the testimony. Brewer was testifying on recross-examination:

"Q. I think there is slight distinction there, possibly. Mr. Radovich told you, as I understand your testimony, that the rung was in the forward ladder. that is right, is it? A. Yes.

Q. And if any repair was to be made, that was the place where it was. I suppose that was generally the conversation, wasn't it? A. yes.

Q. But he didn't order you or give you any instruction to go ahead and repair it, did he?

A. No. He said to make the repair—

Q. Didn't you know that he had no authority to order the repairs?

Mr. Gearin: We object to the question, your Honor.

Mr. Wood: I want to ask him.

The Court: I guess I have to decide that eventually, anyway.

Mr. Gearin: I will withdraw my objection, your Honor.

Q. (By Mr. Wood): You know that, don't you?

A. Whether or not he had authority to order repairs or not?

Q. Yes.

A. We frequently looked to him as to the time that we could do them. I mean it was up to him when the space would be available.

Q. But he didn't give you any specific order or

instruction to go ahead and repair that ladder, did he?

A. It happened just the way I stated it. Whether it was an order or not, he said—

Q. Isn't it a fact all he told you was that it was the forward ladder that had the broken rung in it?

A. Yes, sir.

Q. That is all he told you?

A. Correct.

Mr. Wood: That is all." (R. 503-4).

There was no discussion about cargo (R. 184). Both the Agreed Statement of Facts (R. 53) and the Court's Opinion (R. 75), state: "Without further instruction they proceeded to work on the forward ladder."

Even if Radovich could be considered, as claimed by appellant, to be a managerial officer, as emphatically he was not, the authorities already cited show that he would have had a perfect right to delegate to Albina, the expert, the job of taking the proper precautions to do the welding in a safe manner,—calling for the further removal of cargo if desired, or building proper isolation screens, or having water handy, or anything else. Radovich was not an expert welder. Albina was.

As far as the removal of the portion of the fire line is concerned, Radovich had nothing whatever to do with it, and, as far as the evidence shows, did not even know of it.

The argument on pages 43-45 of Appellant's Brief that Sterling and Radovich were responsibile for the spread of the fire, and that because the fire damage cannot be segregated, Luckenbach is liable for the whole of it, is without merit.

They cite *American Mail Line, Ltd.* v. *Tokyo Marine Fire Ins. Co.,* 270 F.(2d) 499. The Trial Court easily distinguished this case (R. 83), and rejected appellant's argument in these words:

> "Here immediate action was taken to control the fire. In this case, there is no evidence that anyone failed to use reasonable diligence after the start of the fire." (R. 83-84).

But appellant says this is not enough (Brief 45). Appellant says that Sterling's alleged negligence in not personally following up his order to the chief engineer to provide substitute water on the fire line, though occurring before the fire, resulted in damage after the fire, and thus brings him within the *Tokyo Marine* case. No authority is cited for this novel theory. Of course there was no negligence. When Sterling delegated this job to a competent officer, the chief engineer (authorities cited), he did all that could be expected of him and cannot be charged with any neglect.

Sterling left the ship about 3:00 o'clock (R. 317), about the same time the pipe was being removed (R. 434).*

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* In appellants' statement of facts, on p. 36 of their Brief, they say that Sterling was, "in his own words" "aboard the ship until about a quarter to 4:00"; and the removal of the fire main had been completed "no later than 3:00 P.M.," and that the coupling from the ship to the dock was almost directly at the gang-plank going ashore; and that Sterling, in going ashore, must have walked right past this place, and should have observed that the coupling had not been made. There are several answers to this: First, Sterling, having delegated the job to a competent officer, could rely on the delegation. Second, there were several methods of putting water on the fire line; coupling to the dock was not the only one (R. 321-323). Sterling, having delegated this to the chief engineer, could leave it to that officer's choice.

So much for a discussion of Luckenbach's non-liability to cargo under the Fire Statute. The question does not concern Albina, and is moot. The Trial Court's Findings of Fact, including the Opinion, fully cover it. Perhaps we should have let it go at that, and are a little apologetic for not having done so. However, since it brings out matters likewise pertinent to what follows, we will let it stand.

APPELLANT'S POINTS III, IV AND V

These may be grouped together. In sum, they are that the Court erred in holding Albina liable to Luckenbach.

The question is whether Albina is liable to Lucken-

Non-connection to the dock did not indicate that another method had not been used. Third, appellants have not correctly interpreted the testimony referred to. Sterling did not say "in his own words" that he was aboard the ship until "about a quarter to 4:00" (R. 317). What he did say was: "I was aboard until 3:00 o'clock—about a quarter to 4:00, I went over—my ankle started to paining me so bad, I injured my ankle in the morning in the car. Q. I see. And then you left the ship then about a quarter of 4:00? A. I had to. I had to go and take care of my ankle. It was paining me so bad that I couldn't walk on it." (R. 317). We interpret this to mean that he was aboard until 3:00 o'clock, then interrupted himself to say that at about a quarer to 4:00 he went over,—(the sentence is unfinished), but apparently was going to his car or some other place to get relief for his ankle. The words that he left the ship "about a quarter to 4:00" were not Sterling's; they were the questioner's. And all Sterling said was—"I had to. I had to go and take care of my ankle." The fire line pipe was not removed, as counsel state, "no later than 3:00 P.M." The witnesses said that they *thought* it was removed at *about* that time (R. 434, 521). It thus appears that Sterling was not on the ship, as intimated, for a period after the time for making the connection; but on the contrary, he left at just about the time the removal of the fire line was in process of being completed. Certainly he could not be expected to hang around with a bad ankle to see that his order would be carried out.

bach for the damage to the ship and for Luckenbach's expenses. Albina says "No", and that on the contrary, Luckenbach owes Albina its bill for repairing the fire damage to the ship.

The basic contention made by Albina is that the Trial Court erred in holding that Albina's negligence was the sole proximate cause of the damage (Br. p. 47). The first point under this is,—A, that Luckebach was negligent in failing to remove cargo.

Appellant then refers to Luckenbach's "direction" that the welding was to be performed on the forward ladder, and that it was Radovich's duty to remove the inflammable cargo from the area. We have already shown that Radovich gave no "direction" about this at all. Our Brief, pp. 7, 8. The Trial Court's Findings settle it: "Without further instructions, they proceeded to work on the forward ladder." (R. 75). The same is expressly stated in the Agreed Statement of Facts in the Pretrial Order (R. 53). And of course it is obvious that, since the ladder was accessible to the welders, and the welding could have been safely done if they had taken the proper precautions (Finding XIII), there would be no occasion at all for Radovich to remove any cargo until, and to the extent, that the welders of Albina, the expert, requested it. "Radovich had nothing to do with the repairs to the ladders." (Finding X).

The next point is B—that Luckenbach was negligent in failing to supply water in the ship's fire line. This has been discussed already. Finding XVII settles it: "There was no contract or understanding between Luckenbach

and Albina, or any obligation, that Luckenbach would have its fire line in readiness and available during welding, and Albina in no way relied on it when it undertook the job." This Finding is amply supported by the testimony. All that Albina can claim is that Brewer of Albina was present when Sterling and the chief engineer were discussing removal of the main section of the fire line and providing substitute fire protection (R. 489). but he was an onlooker and no promise was made to him, and that generally on the waterfront Albina "assumes" that fire protection will be available (R. 497). But both Brewer and Bailey were indifferent about it. Brewer did not have in mind any particular type of fire protection (R. 497), and Bailey made no inquiries about it whatever (R. 183). The same, of course, may be said of the welders. They went on the ship without notifying anybody, or asking for any hose, or any other fire protection, and undertook the welding independent of the ship, relying on themselves to handle the situation. In fact their standing orders from Albina were to provide their own fire protection (R. 182-183; 184).

The other points, namely, C—that Luckenbach was negligent in failing to have the vessel competently manned because the crew did not know of the interruption in the fire-line; and D—that Luckenbach was guilty of a statutory fault because it allegedly did not adhere to a Coast Guard regulation; and E—that the vessel was unseaworthy because of the cargo close to the forward ladder, and the inoperable condition of the fire line, and the ignorance of some of the crew as to this fact,—

all of these may be discussed shortly together. They all come to the same thing, that the vessel was unseaworthy. But unseaworthiness is no defense to Albina.

The short of it is that Albina breached its contract, as an expert, to do an expert's job. It was as an expert welder that it was hired. Unseaworthiness does not touch that.

In *Ryan Stevedoring Co.* v. *Pan Atlantic SS Corp.,* 305 U.S. 124, 100 L. Ed. 133, the ship was unseaworthy because of cargo stowage. In *Weyerhaeuser* v. *Nacirema,* 355 U.S. 563, 2 L. Ed. (2d) 491, the winchman's shelter was unseaworthy. In *Crumady* v. *Fisser,* 3 L. Ed. (2d) 413, the "cut off" device on the winch was unseaworthy. In *Calmar* v. *Nacirema,* 266 F.(2d) 79, the cable of the cargo light was unseaworthy. In the latest case, *Waterman SS Corp.* v. *McNamara,* 5 L. Ed. (2d) 169, the cargo stowage, like *Ryan,* was unseaworthy. In all of these the unseaworthy feature was a very part of the contract to be performed. It was an ingredient of it. Yet its unseaworthiness did not excuse the contractor. The fire line of the ROBERT LUCKENBACH was not a part of the contract to be performed; nor in any way connected with it, so, a fortiori, can in no way be used as an excuse by Albina.

It may also be remarked that there was certainly no unseaworthiness as alleged, either closeness of cargo to the ladder, or the interruption in the fire line, until that alleged unseaworthiness was "brought into play" by the gross negligence of Albina's welders. Just as the unseaworthiness of the defective winch in *Crumady* was

brought into play by the stevedore. The latest decision of all,—*Waterman SS Corp.*, supra, states the same thing: "The warranty (of good performance by an expert) may be breached when the stevedore's negligence does no more than call into play the vessel's unseaworthiness." 5 L. Ed. (2d) at page 171.

The above are all stevedore cases. But the same principles apply to repairmen.

Amato v. U.S.A. 1. Bethlehem, 167 F. Supp. 929.
Albina Engine & Machine Works v. American Mail Line, Ltd., 263 F.(2d) 311.
Boothe SS Co. v. Meier, et al., 262 F.(2d) 310.

And of course it makes no difference whether the suit is for "indemnity" or, as here, for damages. As said by Judge Mathes in the *Hugev* case, the right to indemnity "is nothing more or less than a right to recover damages for breach" of contract. 170 F. Supp. 601, 607, citing authorities.

How flagrantly Albina breached its contract is plain:

Its isolation screen of plywood walk-boards was so ineffectual that at the very *first* flash of welding, the burning metel either rolled under or flew over the screen, or probably did both. This did not happen later during the course of the work. It happened at the very outset, and shows how flimsy the protection was. The screen, besides being open underneath, was only 4 feet high, and the welding was within 1 foot of the top of it. The propensity of welding sparks to fly—to arc—is well known.

There was no water, except in the longshomen's can —completely inadequate.

No fire extinguishers were present.

No hose attached to any hydrant and dropped into the hold, as the Portland Police Code required, was present, although apparently the welders had hoses with them on the dock right by No. 4 hatch (R. 384), and there were hydrants "all over" the dock (R. 324, 511). If their own hoses were insufficient, they could have borrowed some from the ship. They could even have had water ready at hand by the ship, if they had notified the ship in advance to prepare for it.

Finally: They were the sole judges of the conditions. If the conditions were not safe, or could not be made safe, it was their duty "to stop all operations as soon as it should have realized that it was unsafe to proceed without the danger being corrected." (*Revel* v. *American Export & Whitehall Terminal Co.,* 162 F. Supp. at p. 287).

The gross negligence in performing the contract is clear, and well deserved the rebuke of the Trial Judge and his Finding that it was the sole cause of the fire.

In conclusion we say that Albina's appeal is entirely on questions of fact, where the Findings of the Trial Judge are amply supported by evidence. They are so obviously right that they do not need the support of the "clearly erroneous" rule. But under that rule, affirmance seems to us absolutely required.

Respectfully submitted,

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APPENDIX

American Bar Association Journal
November, 1960, at p. 1162

PRIVITY UNDER THE FIRE STATUTE BURDEN OF PROOF

What is known in admiralty law as the Fire Statute, 46 U.S.C., §182, reads as follows:

> Loss by fire. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

The "design or neglect of such owner" must be his personal neglect. In the case of corporations, it must be the design or neglect of some executive or managerial officer of the corporation in control of those activities which caused the fire. *Walker* v. *The Western Transportation Co.,* 3 Wall. 150, 18 L. ed. 172; *Consumers Import Co.* v. *Kabushiki Kaisha,* 320 U. S. 249, 88 L. ed. 30.

In such a case the corporation is held to be "privy" to the cause of the fire, and therefore liable. In short, it is the old doctrine of "privity" or *personal* fault, familiar in the limitation of liability cases under 46 U.S.C., §§183 *et seq.*

> The same rule is applicable to the words "privity or knowledge" in §4283 (46 U.S.C. §183) *Craig* v. *Continental Ins. Co. of N. Y.,* 141 U. S. 638; 35 L. ed. 886.

But there similarity ends. For there is an important difference between the two statutes. Under the limitation of liability statute, the shipowner, seeking to limit his liability, has the *burden of proof* to show that he was *not* privy to the cause of the loss or damage. Liability having been found against him, he has to prove that he was not personally to blame if he seeks to limit that liability. Naturally, since he seeks to limit a liability already found, he has the burden of proving his right to the limitation. *Coryell* v. *Phipps,* 317 U. S. 406, 87 L. ed. 363; *In re Reickert Towing Line,* 251 Fed. 214.

The Fire Statute is quite different. There the shipowner has no such burden of proof. On the contrary, that burden is on the person seeking to hold the shipowner liable for the fire. He must prove that the shipowner was privy to the cause of it. The two statutes in this respect are diametrically opposed. Thus, in the Fire Statute cases, it has been stated:

> The primary law (the Fire Statute) is, therefore, one of non-liability, except under the conditions stated. From ordinary rules, it is inferred easily that, after the loss has been shown to have arisen from fire, the burden is on those asserting that the fire was caused by the shipowner's design or neglect to prove it, and, indeed, the authorities are to that effect. [*The Strathdone,* 89 Fed. 374.]

> The statute provides immunity for the shipowner from liability for fire damage to cargo "unless such fire is caused by the design or neglect of such owner" (authorities). As there is no claim or reason that the fire was caused by the design of the owner, the issue is narrowed to whether or not it was caused by the owner's neglect. The burden of proving that the neglect of the owner did cause the fire rested upon the libelants . . . [*Hoskyn & Co.* v. *Silver Line,* 143 F. 2d 462, 463.]

> It is well settled that a shipowner is not liable for damages resulting from fire unless libelant proves that the cause of the fire was due to the "design or neglect" of the owner, the burden being upon libelant. [*Fidelity-Phenix Fire Ins. Co.* v. *Flota Mercante Del Estado,* 205 F. 2d 886, 887.]
>
> The burden of proving that the shipowners were guilty of "design or neglect" is, under the statute, cast upon those who allege it—the libelants. . . [*The Cabo Hatteras,* 5 F. Supp. 725, 728.]
>
> To deprive the owner of the benefit of this statute, the claimant must prove (1) the cause of the fire, (2) the existence of design or negligence, and (3) that such design or negligence was that of the owner himself or his managing agent. . . [*Connell Brow. Co.* v. *Sevenseas Trading & Steamship Co.,* 111 F. Supp. 227, 229.]

And 3 Benedict's *Admiralty,* 6th Edition (1959 Supplement) page 55, says:

> The burden of proof that the fire was caused by the design or neglect of the owner is on the libelant.

It is surprising, therefore, and regrettable, to find the Court of Appeals for the Second Circuit fall into the error of stating that:

> Once negligence has been shown the burden of proof of coming within the exemption from liability of the Fire Statute, just as in the similar exception in the limitation statute, 46 U.S.C. §183, is on the owner. [*Verbeeck* v. *Black Diamond Steamship Corp.,* 269 F. 2d 68, at page 71.]

The authorities cited for this statement do not support it at all. Two of them are limitation of liability cases, and the other is a footnote to the text of Gilmore and Black's *Law of Admiralty.* But the footnote does not

say that the law *is* as stated by the court. It only says that, in the opinion of the authorities, it *should* be.

This fails to perceive the essential difference between the two statutes. The limitation statute is a law of *limitation*. The Fire Statute is a law of *exoneration*. The limitation statute concedes that liability has been established, but then allows the shipowner to limit that liability by proving that he was not privy to it. It abolishes the rule of *respondeat superior*. Since it gives the shipowner this privilege, it is only right that the burden of proof should be on him to prove that he is entitled to it.

The Fire Statute, on the other hand, being a statute of exoneration, lays down the condition which the libelant must meet to hold the shipowner liable. It is, as said in *The Strathdone, supra,* a law of "non-liability, except under the conditions stated". One of those conditions is that the fire must have been caused by the personal design or neglect of the shipowner. This is a necessary element in libelant's or plaintiff's case. His right is founded on it. He must prove it, just as the plaintiff must prove scienter in a vicious dog case, or malice in certain types of libel cases, or the blow in an assault case, or any fact in any other case where the law establishes such fact as a basis for the right.

It is to be hoped, therefore, that the courts will take a careful look at the Second Circuit decision before following it.

ERSKINE WOOD

Portland, Oregon

No. 17070

In the

United States Court of Appeals

For the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC.,
an Oregon corporation,
Appellant,

vs.

HERSHEY CHOCOLATE CORPORATION,
a Delaware corporation, et al,
Appellees.

ANSWERING BRIEF OF APPELLEES HERSHEY CHOCOLATE CORPORATION ET AL

Appeal from the United States District Court
for the District of Oregon

HONORABLE JOHN F. KILKENNY, JUDGE

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Appeal from the United States District Court
for the District of Oregon

HONORABLE JOHN F. KILKENNY, JUDGE

JURISDICTION

The District Court had jurisdiction under 28 USCA § 1333(1).

On May 16, 1960 the District Court entered an interlocutory decree (R 92-94). Appellant Albina Engine & Machine Works, Inc. ("Albina") appealed within the

time permitted by 28 USCA § 2107 for proceedings in admiralty (R 95).

This Court has jurisdiction under 28 USCA §§ 1292 (3) and 1294(1).

STATEMENT OF THE CASE

Introduction

Albina's statement of the case is incomplete and must be supplemented.

As against appellees Hershey Chocolate Corporation et al ("cargo"), Albina's argument proceeds as follows:

a) Albina's negligence caused the fire which extensively damaged the cargo; however,

b) The antecedent negligence of appellee Luckenbach Steamship Company, Inc. ("Luckenbach") prevented prompt extinguishment of the fire and was therefore the sole cause of some of the damage; and

c) Albina is not liable to cargo for that part of the damage (Br 42-43, 62-63, 68, 76-77).[1]

The libels filed by cargo (R 3-10) asserted claims against Luckenbach (as well as Albina) and alleged owner's design and neglect rendering the fire statute (46 USCA § 182) inapplicable. Cargo was and is still of the opinion that the fire resulted from the concurring

1. Other issues exist between Luckenbach and Albina, but Albina claims nothing for them as against cargo.

fault and negligence of Albina and Luckenbach's managing officers and agents. However, the applicability of the fire statute turned on questions of fact. The trial court found against cargo on those questions (R 80-84)[2] and held that Luckenbach was not liable by reason of the fire statute.[3] Cargo, being content with its decree for recovery of all of its losses from Albina, did not appeal from the decree in favor of Luckenbach.

Albina's Gross Negligence[4]

1. The trial court's findings.

The trial court found that

> "It is clear that Albina, in using the torch for the cutting and welding of metal in the presence of highly inflammable burlap bags, was undertaking an extremely dangerous operation. Even if Albina, by deliberate design, had attempted to create a hazardous fire condition, it could have made no improvement. The use of an acetylene torch, with its attendant heat and great danger, under these conditions, was nothing less than wanton conduct. * * *" (R 77)

2. That finding and, indeed, all other findings of the trial court are to be sustained on appeal unless clearly erroneous. Rule 52(a) FRCP; *McAllister v. US*, 348 US 19, 75 S Ct 6 (1954); *Marshall v. Westfal-Larsen & Co.*, 259 F2d 575 at p. 577 (CA 9 1958).

3. It found that Sterling, a managing agent of Luckenbach, was not negligent and had ordered the ship's water lines to be connected with the dock hydrant (R 81, 88). It also found that Radovich was a subordinate employee with limited duties which did not relate to the ship's repairs (R 81, 88, 89) and that there was no evidence of a lack of due diligence by anyone after the fire started (R 84).

4. The testimony relating to this subject is ignored in Albina's Statement of the Case (Br 4-17).

It also found that

"The fire was caused solely by the gross negligence of Albina in the manner in which it attempted to do the welding. There was no welding at the after ladder, so that is eliminated. The welding at the forward ladder could have been safely done, if proper and usual precautions had been taken. There was ample space — between 2 and 4 feet between the ladder and the cargo, in which to erect a fireproof, insulating screen, or curtain; notice to the ship's officers could have been given by the welders when they came aboard that welding was about to commence, and to have water ready; a hose either from the ship (if notice had been given) or from the dock could have been led into the hold with water pressure in it; one or more fire extinguishers could have been at hand. The requirements of the Portland City Ordinance regarding welding could have been complied with. If any of these precautions had been taken, there would have been no fire. Instead, none was taken. The only thing relied on was a can of longshoremen's drinking water left in the hold, which, of course, was utterly inadequate." (R 89-90)

The record sustains these findings and Albina's resulting liability for all of the loss which resulted to cargo.[5]

2. Statement of the facts.

a. Albina's conduct prior to the fire.

When its welding crew went aboard the vessel, Albina knew that a section of the main fire line in the

5. Albina expressly concedes that the record supports a finding that its failure to take additional precautions "proximately contributed" to the fire (Br 62). It denies only that it was guilty of gross negligence or that its conduct violated applicable statutes, ordinances and regulations (Br 51-60, 62).

engine room had been removed for repairs, and that there would be no pressure in the ship's water lines unless a substitute water supply had been established. However, it took no steps to ascertain that such had been done, nor did its managing officials ascertain the nature of the cargo in the forward part of No. 5 hold after being told that the repair was to be made to the forward (not the after) ladder.

Mr. Sterling, Luckenbach's port engineer (R 313), received the repair orders from the ship's officers (R 315-316) and arranged with Mr. Bailey, Albina's superintendent in charge of repair work (R 173, 496), for removal (and repair) of the fire line (R 318) and for the new ladder rung (R 175).

Mr. Bailey received the ladder repair order from Mr. Sterling through Mr. Brewer, Albina's superintendent at Swan Island (R 175, 487, cf 326).[6] He gave instructions to Albina's day-shift foreman for Mr. Smith to do the job (R 122, 179). He was advised that cargo would be cleared from the area of the ladder by 6 p.m. and that the welding should be done between 6 and 7 p.m., while the longshoremen were having their supper break (R 122-123, 149, 177, 184, 326). Mr. Bailey and Mr. Brewer both inspected the job area with the chief mate, who told them that the work was to be done on

6. Such minor repair orders are commonly given verbally rather than in writing. This order was verbal (R 176, 181, 325-326).

the after (not the forward) ladder in No. 5 hold (R 316, 317, 327). However, the cargo of metal conduit stowed in the after part of No. 5 hold was high around the after ladder, and they could not see the area of the reported broken rung (R 178, 183, 316).

Later that day, Mr. Radovich reported to Mr. Brewer that the broken rung was on the forward (not the after) ladder (R 184, 503). Nothing was then said about removing cargo from the area of the forward ladder (R 503). Mr. Brewer transmitted this information to Mr. Bailey at about 4 p.m. (R 184, 510), before the repairs were attempted (R 503). Mr. Bailey, however, made no inquiry respecting the nature of the cargo stowed in the area of the forward ladder (R 184).

Earlier the same day, Albina removed a section of the main fire line in the engine room for repairs, thereby rendering the ship's water lines inoperative in the absence of a substitute supply (R 186, 279-281, 315-316, 327).[7] The line was to be replaced the following day (R 327-328).

The pipefitters who removed the fire line, as well as the welding crew, were under the direction of Mr.

7. The fresh water tanks (which were attached to the shore hydrant during the afternoon (R 290-291)) could not be connected for fire protection (R 291-292). However, the ship had a CO2 system in the holds (R 283-284). Albina apparently knew nothing of this when it commenced welding. Mr. Sterling testified that the port side line was still operative up through the midship house (R 321-323). However, that line did not supply water to the holds (R 446-447; cf Br 11).

Bailey, who actually saw the fire line removed (R 510-511). He knew that removal of the fire line disabled the ship's water system unless an alternative supply should be arranged (R 517-518); however, he made no investigation to see if an alternative supply of water had in fact been established (R 187, 188, 518).

He knew that the chief engineer, Mr. Hebert (R 276), had requested that this be done (R 187-188). Mr. Hebert, on the other hand, relied on Albina to make the connection (R 280-281). He "was certain" that the connection had been made and did not check the fact (R 287). Mr. Hebert had told Mr. Sterling that he would take care of the connection (R 321, 323, 488-489). The ship's captain testified that responsibility for hooking up the shorelines rested upon *both* the contractor *and* the ship (R 210-211).

Albina had previously ceased the practice of notifying the captain of the port prior to commencing welding jobs and did not do so in this case (R 185). Luckenbach, on the other hand, always relied on the contractor to give notice of welding to the port captain (R 320-321).

b. Conduct of the welding crew.

This was a "hurry-up" job which had to be completed before the longshoremen returned from their dinner-break (R 149). Albina's three-man welding

crew, with Lester L. Smith in charge (R 118), went aboard to install the ladder rung in No. 5 hold at about 6 p.m., after the longshoremen had stopped work (R 118, 123). None of Albina's employees spoke with any of the crew members or told them of the prospective welding operation prior to the fire (R 119 (Smith); R 146 (Riley); R 168 (Larson); R 180 (Bailey)).[8]

The welding crew had with them a dolly carrying the welding equipment (R 539-540), but brought no fire fighting equipment of any kind (R 540). The welder (Mr. Larson) was instructed to string the welding lead down into No. 5 hold (R 119), which he did (R 121, 146, 147, 159-160).

Mr. Smith, the foreman, was first in the hold (R 147, 161). He found cargo at the forward end of the hatch within two or three feet of the ladder (R 120, 221). The cargo, which was then observed by the welding crew to consist of paper and burlap (R 125-126, 169, 523, 550, 572; see also R 223), ran clear across the width of the ship (R 120, 221, 147-148), and there was an area of ten or twelve feet "between the two bunches of cargo" (R 120, 126).[9] The broken ladder rung was four or five feet above the landing pad which covered the floor of the hold (R 124, 168).

8. It is stipulated (R 53) that the welders determined that it was the forward ladder which required repairs and that they proceeded to work "without further instructions."

9. See also stipulated facts (R 53).

Mr. Smith, prior to the arrival of Larson and Riley (R 148), built a partition four or five feet high (R 132, 558, 584) from some pieces of plywood and cardboard which he found lying on the floor of the hold (R 124-125, 131, 141, 162, 532-533). He leaned the pieces against the cargo (R 125) and placed a one-inch board along the bottom (R 125, 131, 142, 162, 544). This board "was supposed to be tight against the deck" (R 131). He thought this would be sufficient precaution against fire (R 130-131).

The only other precaution of any kind taken against fire was to have present a three to five gallon can of drinking water which Mr. Smith found in the after end of the hatch, one probably used by the longshoremen (R 129, 147, 161, 540-541, 578).

Mr. Smith did not ascertain prior to commencing welding whether there was any pressure in the ship's water lines (R 133, 532). He had not been told that the main line was severed (R 527).

Mr. Riley or Mr. Smith told the welder, Mr. Larson (R 158, 163, 570), to strike an arc and melt a gob of weld off the old weld on the ladder (R 125, 149, 163-164, 553). When he first struck an arc, sparks immediately fell to the deck and rolled toward and under the plywood shield and into the cargo (R 125, 132, 149-150, 171, 524, 545, 549-550, 553).

"* * * He struck the arc and of course, the sparks fell down on the deck and it bounced underneath the bulkhead or they rolled underneath, and we couldn't get at it to get it out." (R 149)

Mr. Smith immediately told him to stop (R 125, 553, 572). He pulled the plywood back and saw flames (R 125, 132). Mr. Smith threw the can of water on the flames, but

"* * * it just took off in between the bales, to where I couldn't get the water to it by pouring it on. * * *" (R 125; see R 143, 164, 524, 553, 573-574)

"Q. Now, Mr. Smith, you said that when you pulled the plywood back, you found flames?

A. Yes, that's right.

Q. This was instantaneous?

A. Yes, sir.

Q. Now, were these flames advanced or did they appear to be small and spread rapidly?

A. It spread rapidly—I mean, it wasn't a big blaze, but she was back in between the bales. I mean, the spark caught on fire and just seemed to spread back in between the bales."[10] (R 128)

---

10. Mr. Smith testified at the trial that the sparks ignited

"* * * the lint on one of these bales. They had some burlap bales down next to the deck, and when it hit this lint it just flash-fired, and she carried through to where I couldn't get it. * * *" (R 524; see also R 548)

He also testified:

"* * * sure, it was a serious fire, * * *" (R 525)

Mr. Riley testified at the trial that he saw smoke, but no flames (R 553, 554, 556, 559). This was contrary to his testimony at the Coast Guard hearing (R 559).

The fire spread very quickly.

"Q. Oh, you mean you climbed up on deck to get a fire hose just because the spark went under the bulkhead?

A. Oh, no sir, it was starting to go. I mean, there is no stopping that piece of hemp once it starts burning.

Q. It started to flame instantly, did it?

A. Yes, sir." (R 150)

"Q. Did the flames seem to move rapidly—did you observe it to move?

A. Yes.

Q. It did?

A. Yes." (R 164)

"Q. Was it this particular cargo [of burlap and paper] that seemed to flare up rapidly—where the flames spread rapidly?

A. Yes.

Q. It was?

A. Yes." (R 169; see also R 170)

"Q. Did I understand you to say there was a flash fire at once?

A. When I looked at it, yes, it traveled—I don't say like gasoline would go—

Q. Over what extent?

A. Well, it was back in there eight or ten feet in the bales.

Q. It just flashed back?

A. Yes." (R 543)

The witness poured water on the fire but

"Q. * * * The fire had got beyond that area, had it?

A. That is right. It was back in between the bales. There was other cargo on top of it." (R 543)

Since the water in the drinking can was insufficient to put out the fire, Mr. Smith told Mr. Riley to bring down a deck hose (R 150, 525). There was testimony that this took about two minutes to do (R 528, 555). However, despite three requests by Mr. Smith that water be pumped into the line, there was no pressure in the main—and no water (R 133-135, 151, 526-527, 554-555). Mr. Smith testified at the trial that the fire was then located in the forward part of the hold (R 529).

Mr. Larson stayed in the hold until it was so smoky that he had to leave (R 137, 574-575).[11] He came on

11. For some time after the fire began, and even while it was flaming and smoke was billowing from the hold, Mr. Larson was still denying to men on deck that there was any fire or anything burning except the welding torch (R 275, 353-354).

deck before (or just as) the fire trucks arrived (R 154, 165, 575). He left the hose in the hold (R 154). The welding crew made no further effort to fight the fire until the fire department came (R 137, 151-152, 155, 166), except to break the lead to the welding machine (R 139, 166).

c. Customary and necessary safety practices ignored by Albina.

Mr. Sterling testified, and his testimony was not contradicted, that it is the contractor's responsibility to take necessary fire precautions during welding operations:

> "Q. Now, referring to item number 4, which is the repair of the ladder rung, what arrangements, if any, were made by you relative to any fire protection during the welding?
>
> A. *Well, we don't make any.* The yard, when they go up, they generally have a man—they bring three men along and one of them is generally a foreman and then they have a man as a fire watch and then they have a welder.
>
> Q. I see.
>
> A. *They are supposed to have the equipment.*
>
> Q. Now, with respect to the fire watch and equipment—to what do you refer? Would you consider, for example, a drinking bucket of water near at hand sufficient (interrupted)—
>
> A. *No; they should have one of these little spray pumps like they used to have during the war* for (interrupted)—

Q. You mean a water spray?

A. Yes; water spray.

Q. Has it been generally—the practice as you have observed it for such a pump to be furnished by the welders?

A. Oh, yes; the yard—the yard—they used to have lots of them. Sometimes they bring a CO2 along. *That's up to the yard, whatever they want to send along with their fire watch.*" (R 324-325; emphasis supplied)

Mr. Riley testified at the Coast Guard hearing of the customary safety practices which are necessary in such operations.

"Q. * * * is there any form of general practice that you conform to for safety's sake, when you have to weld in cargo holds?

A. Well, we usually have a fire extinguisher or water in the holds.

Q. Like you did in this instance—(interrupted).

A. Yes, sir.

Q. —a bucket? But is it a practice say for you to insist upon the ship's force rigging a fire hose in advance and having pressure to the nozzle?

A. No, sir.

Q. Pressure to the hydrant?

A. Not to my knowledge it isn't.

Q. There weren't any hand extinguishers nearby at hand, were there?

A. No, sir.

Q. Have you ever been given any specific instructions by your employers relative to what you will do and what you will not do with regard to safety against fire?

A. Well, they ask us to have a fire extinguisher; that's about all.

Q. They ask you to have a fire extinguisher?

A. Yes, sir.

Q. Or did they direct that you shall have a fire extinguisher?

A. Well, we should have one, yes.

Q. Then this bucket, I take it, in this particular instance, was to be a substitute for the fire extinguisher?

A. Yes, sir.

Q. Are there—did you get those instructions with regards to having a fire extinguisher verbally or is there something in writing that you know of?

A. Not that I know of.

Q. I see—strictly verbal instructions furnished all welders?

A. Well, it is for everybody working on the waterfront, yes."[12] (R 156-157)

12. Mr. Riley's testimony at the subsequent trial contradicted this plain statement of fact and was thoroughly impeached (R 560-566). His clumsy efforts to extricate himself from the resulting contradictions succeeded only in emphasizing his earlier testimony. See also libelants' Ex 7B. His testimony at the Coast Guard hearing

> ". . . made while the circumstances were vivid in the memory of the witness, at a time when no litigation was pending . . . [is] entitled to great weight. . . ."
> *(Meyer v. T. J. McCarthy SS Company (etc.)*, 1960 AMC 877 at p. 881 (DC ND Ohio 1960))

It was stipulated that the testimony given at the Coast Guard hearing might be offered by any party and received in evidence (R 56).

Mr. Larson also testified positively to the precautions prescribed by Albina for welding in the holds of vessels.

"Q. What normally is your practice?

A. Well, we usually use water or anything that we can—that we can—make it as safe as we possibly can.

Q. You mean keeping water on hand for an emergency?

A. Yes.

Q. Are there any instructions that you have ever been issued by your company with respect to maintaining any fire prevention equipment on hand?

A. Yes, there has been; yes.

Q. What, specifically have you been instructed to do?

A. *Either pull out—put out—pull out a fire line or use a CO2 bottle, or something like that.*

Q. In other words, to keep some fire-fighting apparatus on hand in readiness, is that it?

A. Yes, that's right.

Q. Are these written instructions or are they verbal?

A. Verbal instructions.

Q. Verbal instructions. Do you have anything in writing at all?

A. No; no." (R 170-171; emphasis supplied)

None of these minimum and customary safety precautions was observed by Albina on this occasion.

d. Additional circumstances of negligence.

1) As shown above (supra, p. 6), Albina knew that a section of the main fire line had been removed. In fact, it had performed the removal itself. However, it proceeded with welding operations without ascertaining if a substitute water supply had been established.

2) The welding crew should have anticipated the danger of sparks resulting from this work.

> "The Witness: That is not an unusual thing, for sparks to fall like that in that type of welding, your Honor, no.
>
> The Court: It is a rather common thing, is it not?
>
> A. Well, yes.
>
> The Court: That is all." (R 545)

3) The cargo, the nature and location of which was observed by the welding crew, was extremely close to the point of operations.

> "The Court: Then how far away was it started? Would you say it started from directly underneath the rung?
>
> A. Probably two feet, something like that, or two and a half feet. There was cargo directly behind.
>
> The Court: Then when you put these cartons up there you knew there was burlap within two or two and a half feet of the particular ladder?

A. Yes. I knew the cargo was there. I don't say that I especially noticed the burlap.

The Court: You knew—

A. I knew there was sacks there; yes, sir." (R 550; see also R 560, 572)

4) Albina's supervisory employees did not ascertain the nature of the cargo about the forward ladder after being told that it was to be repaired, nor did they arrange for its removal prior to welding (R 184, 503).

OUTLINE OF ARGUMENT

1. Albina's gross negligence caused the fire.

2. Albina was liable to cargo for all resulting damage, whether or not Luckenbach should also have been held liable for all or a part of such damage.

3. Albina violated applicable ordinances, statutes and regulations which were binding upon it.

4. The trial court did not err in adopting its opinion as findings of fact and conclusions of law.

ARGUMENT

1. Albina's gross negligence caused the fire.

Albina was grossly negligent in the following particulars:

a) It conducted welding operations within two or three feet of highly dangerous and inflammable cargo, and it did so without an adequate supply of water and without ascertaining whether an adequate water supply was available (Specification 2, R 59).

b) It did not erect a suitable or sufficient barricade between the welding area and the cargo (Specification 7, R 59). The very first time an arc was struck, sparks rolled beneath it and ignited the cargo.

c) It did not have any fire extinguishers or other fire fighting apparatus of any kind at the place where the welding was being conducted (Specification 6, R 59). Customary safeguards to prevent or extinguish fires were ignored or forgotten.[13]

d) Its employees gave no notice to the ship's crew that such work was to be carried on, nor did they take any steps prior to welding to ascertain that the ship's water system was in operating condition (Specification 1, R 59). This was particularly negligent, because Albina, earlier that same day, had removed a section of the main fire line in the engine room for repairs.

e) Its superintendent did not investigate the nature or location of the cargo before ordering the welding

13. Albina suggests that it followed customary practices (Br 62). This assertion was conclusively disproved by the testimony of Albina's own employees at the Coast Guard hearing (reviewed above, pp. 14-16) and the utter confusion of Mr. Riley when he attempted to change his story at the trial (R 560-566).

crew on the job.[14] He did so, even though Albina knew that

> "* * * there is a fire hazard in working in cargo holds." (R 183)

Albina's admission of negligence is proper (Br 62). In *Lawrence Warehouse Co. v. Defense Supplies Corp.*, 164 F2d 773 at p. 776 (CCA 9 1947) this Court held that evidence of the use of an acetylene torch in the vicinity of inflammable material without providing any fire fighting equipment except a five gallon bucket of water supported a finding of negligence.

In *US et al v. Todd Engineering Dry Dock & R. Co., Inc.*, 53 F2d 1025 (DC La 1931) it appeared that immediately prior to a fire, the defendant repair company's employees had used a blowtorch near tank tops littered with oily rags and other inflammable material. The court said that the accumulation of debris constituted a hazard and considered what precautions should have been taken.

> "It was unquestionably the duty of the repairmen *to secure full information as to the dangers presented*, and this of course required them to examine into the condition in the bilges and on the tank tops to determine whether or not they were

14. The record also demonstrates negligence with respect to other specifications set forth in the pretrial order, but these are believed to be established beyond question.

sufficiently clean. If they were not clean, they should have been cleaned and a man then given a bucket of sand or a fire extinguisher whose sole duty would be to watch the sparks and the molten metal. As a further precaution the repairmen should have placed a man with a bucket to catch the sparks, *and it undoubtedly would have been good practice to have spread a piece of wet canvas between the boilers to guard the tank tops which were openly exposed.*

Though their duty was plain, it is clear from the evidence that the respondent's servants took no precautions but proceeded to use the oxy-acetylene torch *without examining the tank tops or looking into the bilges and without employing any of the usual and customary safeguards. This failure of duty on their part constituted gross negligence.*" (at p. 1031; emphasis supplied)

See also *International Mercantile Marine SS Co. v. W. & A. Fletcher Co.*, 296 Fed 855 (CCA 2 1924), cert den 264 US 597 (1924) in which the Court said:

"* * * The only cause suggested by the evidence is the blowtorch, and *the maintenance of that probable cause in proximity to so much inflammable material was itself negligence. Liability is measured by the known dangers to be guarded against*, and if care according to the circumstances is wanting, the natural inference is that injury accrues from the known danger — it is caused by the lack of care. The blowtorch near remover and waste was negligence, the danger of fire was well known, and we find adequate cause proximately existing in that negligence for the ensuing loss. * * *" (at pp. 858-859; emphasis supplied)

See Anno: *Liability for injury or damage resulting from fire started by use of blowtorch*, 49 ALR 2d 368.

The evidence conclusively established Albina's gross negligence.

2. Albina was liable to cargo for all resulting damage, whether or not Luckenbach should also have been held liable for all or a part of such damage.

The trial judge found as a fact that there was no lack of due diligence by any person after the fire began (R 84), and that Albina's gross negligence caused the fire (R 89). This finding of proximate cause is "peculiarly within the province of the jury or other trier of fact" (*Orr v. Southern Pacific Company*, 226 F2d 841 at p. 843 (CA 9 1955)).

Albina, however, contends that the prior negligence of Luckenbach in failing to remove cargo and in failing to have an adequate water supply (Br 47-51) was the sole cause of some of the damage, which limits its liability for cargo's loss to that portion of the loss which was sustained in the initial stages of the fire.[15] This contention is wholly without merit.

a) Albina's negligence related not only to the outbreak of the fire, but, in addition, to the failure to extinguish it.

15. There is little evidence from which such an apportionment might be made, even if Albina's theory were correct. See *American Mail Line, Ltd. v. Tokyo Marine & Fire Insurance Co., Ltd.*, 270 F2d 499 at p. 502 (CA 9 1959).

Albina contends (Br 42-43) that if water had been available the "little fire" (R 573) would have been promptly extinguished, and cargo loss would have been small. It argues that since Luckenbach failed to supply the water, Luckenbach alone is responsible for most of the cargo loss. This is an incorrect statement of law, and Albina fails to cite a single case in its support. It is also an incorrect statement of the facts. It was unquestionably Albina's duty to have present the necessary equipment and to take reasonable precautions to extinguish a fire in its initial phase if one should break out (the fire fighting equipment testified to by its employees as necessary and customary on such jobs would, of course, be needed only *after* a fire should break out). It was Albina's failure to have any equipment available to extinguish a "little fire" which enabled the fire to grow and spread.

In *Lawrence Warehouse Co. v. Defense Supplies Corp.*, supra, 164 F2d 773 at p. 776 (CCA 9 1947) this Court held a welder liable because

> "* * * No precautions were taken in the way of providing fire fighting equipment with which such a fire as the torch started could have been put out. * * *"

In *Southport Transit Company v. Avondale Marine Ways, Inc.*, 234 F2d 947 (CA 5 1956), relied on by Albina, the repair yard was held, among other things, to have negligently breached its duty to extinguish the fire after it began. This was

> "* * * a duty which, by its nature, continued after the initial event. * * *" (at p. 955)

Albina's negligence caused the fire to ignite and to spread. On the facts, it is necessarily responsible for all of the resulting loss.

b) Furthermore, there was abundant evidence in the record (reviewed above, pp. 11-12) that *the fire began quickly and spread rapidly*.[16] In such case, all of the resulting cargo damage was the direct and obvious consequence of the very outbreak of the fire which unquestionably resulted from Albina's negligence. The concurring negligence of Luckenbach cannot insulate Albina from liability for all of the resulting damage.

c) This is not a case of subsequent intervening negligence which causes loss not within the scope of the defendant's negligence. Luckenbach's negligence was antecedent to the fire and at most concurred with Al-

16. Appellant argues that it could have been extinguished with slight damage if water had been quickly available, relying solely upon the opinion testimony of its welding crew at the trial (Br 12-13). In view of the record, this is at least debatable.

bina's negligence to cause the loss.[17] However, even if it be regarded as intervening negligence, the claim that it limits Albina's liability is wholly incorrect.

Southport Transit Company v. Avondale Marine Ways, Inc., supra, 234 F2d 947 (CA 5 1956) was an action by a tug owner against a contractor whose negligence in the use of an acteylene torch caused a fire on the tug while it was undergoing repairs. The contractor's employees put some water on the fire and left. Later, the tug master saw smoke, put more water on the fire, and left. All hands then left the ship, and thereafter the fire went out of control and did extensive damage. The court held that the doctrine of contributory negligence was wholly inapplicable, because the negligence of the tug master followed the outbreak of the fire. Secondly, it held that the shipyard was liable for *all* damage caused by the fire, except such as might be shown to have been avoidable by the tug master. It said:

> "*So far as the original fire is concerned, there was, of course, no basis for imposing any or all or part of its consequences on the tug owner.* The shipyard, on the basic fact findings of the District Court * * * was and remains clearly liable for this and *all damage* proximately caused by this fire.
>
> The tug owner's action subsequent to that related not to liability *but to a possible reduction in the*

17. Albina apparently concedes that this was concurring negligence (Br 45; cf Br 66-68, where counsel discusses "intervening cause").

award to the extent that its failure to take reasonable steps augmented the loss. This was, then, a question of diminution of damages, * * *

* * * Under the teaching of the doctrine of avoidable consequence, a substantial burden is therefore heavy on the wrongdoer to establish that prudence called for action by the tug owner at one or more of these stages; and, that had it been taken, the resulting damage would have been substantially different. * * *" (at p. 954; emphasis supplied)

The doctrine of avoidable consequences, as a basis for reducing damages below their full amount, is wholly inapplicable to cargo, an entirely innocent party which had no opportunity to avoid any of the loss.

Indeed, in *Rayonier, Inc. v. US*, 225 F2d 642 (CA 9 1955) and *Arnhold v. US*, 225 F2d 650 (CA 9 1955) this Court held that *it is the presence — not the absence* — of adequate fire fighting equipment sufficient to bring the initial blaze under control which can operate as an independent intervening cause and shield the original wrongdoer from liability for damage caused by a further outbreak of the blaze. The *absence* of such facilities cannot conceivably be an intervening cause when it merely allows the blaze to spread and cause further damage.

Since at most the ship's negligence concurred with Albina's gross negligence, the destruction of the cargo

was simply the foreseeable result of concurring causes. The applicable principle is simply stated:

> "* * * Where two or more causes combine to produce such a single result, incapable of any logical division, each may be a substantial factor in bringing about the loss, and if so, each may be charged with all of it. * * * [E]ntire liability rests upon the obvious fact that each has contributed to the single result, and that no rational division can be made.
>
> * * * It is not necessary that the misconduct of two defendants be simultaneous. *One defendant may create a situation upon which the other may act later to cause the damage. One may leave combustible material, and the other set it afire;* one may leave a hole in the street, and the other drive into it. * * *" (Prosser on Torts (2d Ed 1955) 226-227; emphasis supplied)[18]

Albina is responsible for all of the normal and foreseeable consequences of its negligence. In this case, it negligently ignited and failed to extinguish a fire in the cargo. The damage to the cargo which resulted was the inevitable result of that negligence.

d) Furthermore, Albina knew that the fire line had been removed from the engine room and was therefore on notice that there might be no water pressure in the lines. As a matter of law, it was foreseeable that the substitute water supply might be lacking, and Albina

18. See also Restatement of Torts, § 450; *Inland Power & Light Co. v. Grieger*, 91 F2d 811 (CCA 9 1937).

therefore became liable for all of the cargo loss which resulted from the lack of water in the line.

In *Fredericks v. American Export Lines, Inc.*, 227 F2d 450 (CA 2 1955) it appeared that the plaintiff-longshoreman was injured by a defective skid iron manufactured by one of the defendants. Judgment against the manufacturer was affirmed. The Court said:

> "It is elementary that the concurrent negligence of some third person will not absolve a defendant upon whom liability is sought to be imposed with the consequences of his own delict. * * *
>
> * * *
>
> *That the intervening purchaser will remain passive or otherwise fail to do what he ought to do to prevent the course of events, is a reasonably foreseeable consequence of the original wrongdoing.* Moreover, this is not a distinction based upon mere passivity but rather upon *whether or not the ultimate fact or occurrence is reasonably foreseeable.* This is a far cry from the doing of something or the refraining from doing something constituting an improbable, independent, intervening cause, which is a superseding cause and breaks the sequence. * * *" (at pp. 453-454; emphasis supplied)

The same Court in *Slattery v. Marra Bros., Inc.*, 186 F2d 134 at p. 136 (CA 2 1951) said:

> "* * * The intervening wrong of a third person is no longer considered as 'breaking the causal chain,' or making the first wrong a 'remote,' and not a 'proximate,' cause for all those preceding

events, without which any later event would not happen, are 'causes'. What really matters is how far the first wrongdoer should be charged with forecasting the future results of his conduct; and the intervention of a later wrong is no different from the intervention of any other event. * * *"

In *THE GLENDOLA*, 47 F2d 206 at p. 208 (CCA 2 1931) the court considered the question whether liability extends to all injuries resulting, however improbably, from the initial negligence, or whether only foreseeable damage can be recovered. The court continued:

"In the case at bar, however, that question does not really arise, because it appears to us that, judged by either rule, the Glendola is liable for the strand and second collision. Even if we accept the narrower doctrine, and find it necessary that the later injuries must be reasonably apprehended at the outset, they were such. * * * *It did not require powers of divination to foresee that she would thus have trouble in docking, and while we agree that nobody could foretell exactly how this might arise, that was not necessary, if it was likely that it might include a strand in such narrow waters,* under which she might swing with the tide against one shore or the other. * * *

* * * there may be occasions when the intervention of another conscious agent may be so unexpected that the actor charged with the initial omission should be held no longer liable. * * * It is the probability of the occurrence of the wrong which counts, not the fact that it is a wrong; * * *" (at pp. 207-208; emphasis supplied)

See also *Hansen v. DuPont (etc.) Co., Inc.*, 33 F2d 94 (CCA 2 1929) in which a charterer had negligently stowed cargo, but the owner's agents were thereafter "extravagantly" negligent in its handling resulting in loss by fire. The charterer was held not liable on the ground that the subsequent negligence was so unlikely that it broke the causal chain. However, the court said:

> "A question might indeed arise, if he [the charterer] had seen what they were doing and had failed to intervene. We do not decide what duties his original act of negligence might in that case have imposed upon him; that which he originally could not have anticipated would then in fact have appeared about to take place. * * *" (at p. 97)

In view of the great hazard presented by Albina's welding operations and Albina's knowledge that an essential part of the fire protection system had been removed, it was foreseeable that the substitute supply might not be connected and that cargo would be extensively damaged throughout the hold if a fire should occur. Yet Albina commenced operations in the vicinity of dangerous cargo without fire fighting equipment and without making any investigation to determine if there was water pressure in the lines.[19] It unquestionably "caused" all of the loss.

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19. See also *Johnson et al v. Kosmos Portland Cement Co.*, 64 F2d 193 (CCA 3 1933), cert den 290 US 641-642 (1933); *Union Shipping & Trading Co., Ltd. v. US*, 127 F2d 771 (CCA 2 1942); *Interlake Iron Corp. v. Gartland SS Co.*, 121 F2d 267 at p. 270 (CCA 6 1941); Anno: 155 ALR 157, *Foreseeability as an element of negligence and proximate cause;* 2 Harper and James on Torts 1146, fn 42.

Reddick v. McAllister Lighterage Line, Inc., 258 F2d 297 (CA 2 1958), cert den 358 US 908 (1958), relied on by Albina, held only that the alleged improper stowage was causally unrelated to the accident. The court pointed out (at p. 301) that according to the evidence the improper stowage would not have resulted in any accident at all if the unloading stevedores had followed their customary and usual practice. There was neither notice nor knowledge of the defective condition, and the case has no bearing on the present facts.

e) As to third party cargo, principles of indemnity, contribution and division of damages are inapplicable, and Albina, having contributed substantially to the loss, must bear the entire loss. See, for example, *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 US 282, 72 S Ct 277 (1952) in which an injured stevedore was allowed to recover all of his damages from a shipowner who was found by the jury to be only 25 per cent responsible.

3. Albina violated applicable ordinances and regulations which were binding upon it.

Albina (Br 51-63) expresses concern over the trial court's finding that its conduct violated § 16-2527

of the Police Code of the City of Portland[20] and 46 CFR § 142.02-20 of the Coast Guard Regulations[20], and that such violations constituted negligence causing or contributing to the fire (R 78-79, 90). In view of the evidence reviewed above establishing Albina's gross negligence and Albina's admission of negligence causing the fire (Br 62), the question is perhaps of little importance to cargo. As the trial court found,

> "There is abundant evidence of lack of due care in other particulars as specified by libelants against Albina * * *" (R 78)

Albina's position, in any case, is without merit.

The Portland Ordinance

Section 16-2527 of the Police Code of the City of Portland provides:

> "Section 16-2527. *Burning and Welding.* When any welding or burning is in progress, on any vessel, a suitable fire hose, with nozzle attached, shall be connected with a nearby fire hydrant and a test must be made, before any such welding or burning commences and occasionally while it is still in progress and said hose shall remain, ready for instant use, at least for one hour after any such welding or burning has been completed. A test must be made from time to time during the progress of any such operations. A competent attendant, equipped with not less than one, four pound, CO2 fire extinguisher,

20. It was stipulated that these regulations were "At all times * * * in full force and effect * * * " (R 55-56).

at hand and ready for instant use, shall be on hand and ready to act during each such welding or burning operation. If during any such operation, there will be a transmission of heat, through a bulkhead or above or below a deck where any such work is being done, a fire watch shall be maintained on both sides of the bulkhead or deck. Special attention shall be given where any such operations take place, near a refrigerator compartment or ventilator from any gaseous hold or compartment." (Libelants' Ex 4)

46 CFR § 146.01-12 provides:

"Nothing in the regulations in this sub-chapter shall be construed as preventing the enforcement of reasonable local regulations, now in effect or hereafter adopted, when such regulations are not inconsistent or in conflict with the provisions of the regulations in this part."[21]

Counsel concedes (Br 52) that some local regulations are valid under this provision. He claims, however (Br 54), that the Coast Guard regulation, which merely forbids welding near hazardous cargo and does not require (or mention) having a hose, the testing of such hose or the presence of an attendant equipped with a fire extinguisher, has pre-empted the field of prescribing safety measures to be taken when welding aboard vessels (Br 51-57).[22]

21. The statute has a similar provision (46 USCA § 170(7) (d)).

22. That regulation was, of course, also disregarded by Albina. This is in fact the regulation which Albina claims (Br 58-59) is not applicable to the case, because contractors are not listed among the groups of persons subject to it. Counsel also mentions other regulations which are claimed to conflict with the ordinance; they, however, are more remote than the one now considered and are controlled by the same principles.

The Coast Guard regulation provides:

"Repairs or work involving welding or burning or other hazards.

(a) A vessel having on board explosives or other dangerous articles as cargo shall not proceed to a ship repair plant or enter upon a drydock or marine railway or otherwise undertake repairs, or any work involving welding or burning, or the use of powder actuated tools or appliances which may produce intense heat, in violation of any of the following provisions:

(1) No such repairs or work, except emergency repairs to the vessel's main propelling or boiler plant or auxiliaries thereto, shall be undertaken while any explosives as cargo are on board.

(2) No such repairs or work shall be undertaken in holds containing any other dangerous articles as cargo, nor in compartments adjoining holds in which other dangerous articles as cargo are stowed except necessary repairs to the vessel's main propelling or boiler plant or auxiliaries thereto, including tail shaft and propeller.

(3) No such repairs or work shall be undertaken in or upon boundaries of holds, after the discharge of any cargo of explosives or inflammable solids or oxidizing materials, until all precautions are taken to see that no residue of cargo is left to create a hazard.

(4) No such repairs or work shall be undertaken in, or upon boundaries of, holds that have lately contained substances capable of giving off inflammable or explosive vapors, until such holds have been determined gas free.

(b) None of the provisions in paragraph (a) of this section shall apply to permitted articles of ships'

stores and supplies of a dangerous nature, although provisions shall be taken to afford safe storage and protection to such stores from any risk incident to the repair work.

(c) Contrary to the provisions set forth in this section, emergency repairs may be undertaken when in the judgment of the master, such repairs are necessary for the safety of the vessel, its passengers and crew." (46 CFR § 146.02-20; Libelants' Exh 3)

Counsel relies principally on *The City of Norfolk*, 266 Fed 641 (CCA 4 1920), cert den 253 US 491 (1920) in which a local harbor regulation prohibiting ships from anchoring in a channel was held invalid, because the federal law allowed such conduct. The regulation now considered, however, is silent with respect to the subject matter of the ordinance. It neither forbids nor permits welding operations conducted without safety precautions. It does not purport to regulate or prescribe precautions which must be taken and the fire fighting equipment which must be present when welding operations are performed in the holds of vessels.

Counsel does not contend that the ordinance is unreasonable; he does assert, however (Br 56-57) that this is a regulatory area in which maritime law must be uniform. This is demonstrably incorrect. Local repair operations are properly and conveniently controlled by local rules and policies, and contractors in each port can

know and abide by local regulations which reflect the individual needs of each port. Precautions which are necessary at one port might be an unnecessary burden on the commerce of another port. No uniform rule could possibly be fair or even effective. See Anno: *Necessity of uniformity of regulation as limitation on power of states to legislate as to interstate or foreign commerce in absence of congressional regulation*, 82 L Ed 14.

The substantial interest of the City of Portland in the application of this ordinance to Albina is apparent. A large amount of fire fighting equipment was summoned to fight the fire which resulted from Albina's failure to comply with the ordinance, and other parts of the city, normally protected by such equipment, were temporarily without fire protection. The fire, furthermore, presented a hazard to other port installations within the city. The trial court found that the fire would not have occurred if these, or other precautions, had been taken (R 90).[23]

The ordinance is unquestionably valid. In *Huron Portland Cement Co. v. City of Detroit*, 362 US 440, 80 S Ct 813 (1960) the Supreme Court held that the pro-

23. Counsel asserts (Br 57) that the fire would have occurred even if the ordinance had been complied with. He contends throughout, however, that if water had been available within two minutes after the fire broke out, the resulting damage would have been negligible. Surely, if the ordinance had been complied with, substantially no damage at all would have resulted, justifying the court's general finding that "there would have been no fire" in such case (R 90).

visions of the smoke abatement code of the City of Detroit did not conflict with federal regulations directed to avoiding the perils of maritime navigation. It held that an intent to supersede the police power of the state

> "* * * 'is not to be implied unless the act of Congress fairly interpreted is in *actual conflict* with the law of the State' * * *" (at p. 443; emphasis supplied)

It said:

> "We conclude that there is no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance here involved. For this reason we cannot find that the federal inspection legislation has pre-empted local action. To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists. * * *" (at p. 446)

In *Kelly v. Washington ex rel Foss*, 302 US 1, 58 S Ct 87 (1937) the Supreme Court sustained state legislation providing for the local inspection of vessels which were not subject to federal regulation for safety and seaworthiness. The Court said:

> "* * * The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal

action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two cannot 'be reconciled or consistently stand together' * * *" (at p. 10)

"In the instant case, in relation to the inspection of the hull and machinery of respondents' tugs, the state law touches that which the Federal laws and regulations have left untouched. There is plainly no inconsistency with the Federal provisions. * * *" (at p. 13)

The power and interest of the state was expressly affirmed:

"When the State is seeking to prevent the operation of unsafe and unseaworthy vessels in going to and from its ports, it is exercising a protective power akin to that which enables the State to exclude diseased persons, animals and plants. These are not proper subjects of commerce and an unsafe and unseaworthy vessel is not a proper instrumentality of commerce. When the State is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the State of the power which it would otherwise possess. * * *" (at p. 14)

The only limitation on the power of the state in such cases was that its action must not

"* * * pass beyond what is plainly essential to safety and seaworthiness, * * *" (at p. 15)

Finally, in *City of Seattle v. Lloyds' Plate Glass Insurance Co.*, 253 Fed 321 (CCA 9 1918) this Court sustained the power of the City of Seattle to designate proper places on its docks for the storage of nitroglycerin being transported in interstate commerce. It reviewed the federal legislation and regulations and said:

> "In all this we see nothing in any way relating to the place or places in any harbor of the United States where any kind of an explosive in course of foreign or intrastate commerce shall be placed, kept, or stored; * * *
>
> * * * 'there are many occasions where the police power of the state can be properly exercised to insure a faithful and top performance of duty within the limits of the state upon the part of those engaged in interstate commerce'. * * *"[24] (at p. 324)

The ordinance relates to a matter of public interest and importance to the local port which is not — and should not be — regulated by the Coast Guard regulation. It is valid and binding upon Albina.

Coast Guard Regulations

Albina's welding operation in the immediate vicinity of hazardous cargo was contrary to 46 CFR § 146.02-

24. See also *Buck v. State of California*, 343 US 99, 72 S Ct 502 (1952); *Eichholz v. Public Service Commission of Missouri*, 306 US 268, 59 S Ct 532 (1939); *Skiriotes v. Florida*, 313 US 69 at p. 75, 61 S Ct 924 (1941).

20.[25] Albina does not deny this, but contends only that the regulation does not apply to shoreside contractors who conduct welding operations in the holds of ships. It argues that it (Albina) is free to conduct welding operations near hazardous cargo, even though the ship is not.

However, 46 USCA § 170(7)(a) and (b) authorize regulations controlling the *use* of dangerous articles or substances on board vessels, and 46 CFR § 146.02-4(d) make § 146.02-20 binding upon "all persons engaged in the * * * *handling*" of dangerous articles or substances on board ships. Albina's *use* of dangerous articles and substances in the welding operation constituted a "handling" thereof which rendered the provisions of § 146.02-20 binding upon Albina.[26] As one handling dangerous articles or substances in the hold of the ship, Albina was bound by the regulation forbidding welding in the presence of hazardous cargo. Its conduct clearly violated the regulation.

25. Quoted above, pp. 34-35.
Burlap is a hazardous cargo (46 CFR § 146.27).

26. *Shain et al v. Armour & Co.*, 50 F Supp 907 at p. 911 (DC WD Ky 1943); *Acme Breweries v. Brannan*, 109 F Supp 116 at p. 121 (DC ND Cal 1952); *Liberty Mutual Insurance Co. v. Hercules Powder Co.*, 126 F Supp 943 at pp. 946-947 (DC Del 1954); *International Harvester Co. v. National Surety Co.*, 44 F2d 746 at p. 750 (CCA 7 1930). Other regulations in the same chapter relating to inflammable liquids (§ 146.21-1(b)), inflammable solids and oxidizing materials (§ 146.22-1), compressed gases (§ 146.24-1 (c)), combustible liquids (§ 146.26-1) and other hazardous articles (§ 146.27-1) contain identical definitions of persons upon whom they are binding, except that the word "using" is substituted for the word "handling." We submit that the two words were regarded as substantially identical in meaning by those who wrote the regulations.

4. The trial court did not err in adopting its opinion as findings of fact and conclusions of law.

Albina, citing Admiralty Rule 46½, contends that the trial court acted improperly in adopting its opinion as findings and conclusions while also making additional findings and conclusions (R 87; Br 30-32). It does not, however, seek any relief from this alleged error, by reversal or otherwise (Br 32).

Albina is mistaken. The issues were simple, and the procedure followed by the trial court has repeatedly been approved in admiralty cases. See *Hanson v. Reiss SS Co.*, 1961 AMC 498 at p. 499 (DC Del 1960) and cases there cited.

CONCLUSION

There was abundant evidence that Albina's gross negligence caused the fire and the resulting damage to cargo. Whether or not Luckenbach should also have been held liable is not material to cargo's rights against Albina, which unquestionably must respond for the entire cargo loss.

In addition, Albina was guilty of a gross disregard for applicable regulations and ordinances designed to

prevent such fires and reduce damage from fires resulting from such operations.

Cargo's decree against Albina must be affirmed.

Respectfully submitted,

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JOHN GORDON GEARIN

JAMES H. CLARKE

Proctors for Appellees Hershey Chocolate Corporation et al

No. 17070

United States
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ALBINA ENGINE & MACHINE WORKS, INC.,
an Oregon Corporation,

Appellant,

v.

HERSHEY CHOCOLATE CORPORATION,
a Delaware Corporation, et al.,

Appellees.

APPELLANT'S REPLY TO BRIEF OF APPELLEE LUCKENBACH STEAMSHIP COMPANY
AND
APPELLANT'S REPLY TO ANSWERING BRIEF OF APPELLEES HERSHEY CHOCOLATE CORPORATION, ET AL.

Upon Appeal from the United States District Court for the District of Oregon.

HONORABLE JOHN F. KILKENNY, Judge.

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SUBJECT INDEX TO APPELLANT'S REPLY TO BRIEF OF APPELLEE LUCKENBACH STEAMSHIP COMPANY, INC.

SUBJECT INDEX TO APPELLANT'S REPLY TO ANSWERING BRIEF OF APPELLEES HERSHEY CHOCOLATE CORPORATION, ET AL.

TABLE OF AUTHORITIES CITED IN APPELLANT'S REPLY BRIEFS

Federal Regulations

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APPELLANT'S REPLY TO BRIEF OF APPELLEE LUCKENBACH STEAMSHIP COMPANY

Upon Appeal from the United States District Court for the District of Oregon.
HONORABLE JOHN F. KILKENNY, Judge.

ARGUMENT

Luckenbach's Liability to Cargo

The brief of appellee Luckenbach Steamship Company, Inc., is referred to herein as "Luckenbach's Brief (L. Br.)". Appellant's opening brief is referred to as "Brief (Br.)."

In its answering brief, Luckenbach takes the astonishing position that the question of Luckenbach's lia-

bility to the libelants in the first instance is of no concern to Albina (L. Br. 2).

Any such argument, it is submitted, is absurd in view of the posture of this case. It seems too apparent to require argument that in any case, whether on the civil or admiralty side of the Court, involving two or more defendants, each defendant is concerned with the question whether it is held to be solely liable to the plaintiff, or whether it is held to be one of two or more parties liable to the plaintiff. This question, in many instances, may concern a defendant as directly and vitally as does the question of such defendant's direct liability to plaintiff in the first instance.

In the instant case, an adjudication of Luckenbach's liability to the libelants is a necessary prerequisite to the entry of a decree in favor of libelants and against both Luckenbach and Albina in proportion to their fault. Obviously, this is a matter of vital concern to Albina.

In support of its argument that it is not liable to libelants, Luckenbach cites authority to sustain the proposition that "the Pennsylvania Rule does not apply" (L. Br. 4). That assertion may or may not be correct, but it seems pertinent to point out that Albina did not, in its opening brief herein, place any reliance whatsoever upon the so-called "Pennsylvania Rule."

Luckenbach urges (L. Br. 5) that *Verbeeck* v. *Black Diamond* (CA 2, 1959), 269 F. 2d 68, cited by appellant in support of the proposition that once negligence has

been shown, the burden of proof is upon the shipowner to show its lack of privity, if it would avoid liability by reason of the fire statute, is an erroneous decision. It should be observed that the article set forth in the appendix to Luckenbach's brief, relating to the question of burden of proof under the fire statute, was printed in the "Views of Our Readers" section of the American Bar Association Journal, November, 1960, and was contributed by Mr. Erskine Wood, one of proctors for Luckenbach in the trial of this case and on this appeal. Albina does not question Mr. Wood's good faith in citing that article, since the reproduction of the article in Luckenbach's brief indicates the authorship and date of publication. However, the authorship and date of publication (while this appeal was pending) should be considered before affording any authoritative weight to such article.

Of greater significance is Luckenbach's statement, in attacking the *Verbeeck* case, that the opinion was vacated and that the previous statement of the law regarding burden of proof, was expressly repudiated (L. Br. 5). The later opinion in the *Verbeeck case* (273 F. 2d 61) reveals that the earlier holding with respect to burden of proof, far from being repudiated, was reaffirmed, as is shown by the following quotations:

> "I now believe that a majority of the court was wrong in saying that a specific finding as to Svendsen's position is unnecessary because, once negligence has been shown, the burden of proof of coming within the exemption of the Fire Statute is upon the owner. This situation, namely, the establishment of negligence, did not exist until we

> established it. Hence the owner has not had the opportunity of obtaining the finding which Judge Pope's opinion indicated was necessary." (273 F. 2d at 63)

Attention is also called to the court's instructions with respect to further proceedings in the District Court:

> ". . . The owner's petition for rehearing is granted but only so far as concerns the claims of the cargo owners; and the limitation proceeding instituted by . . . the owner . . . is remanded as to claims of cargo owners for findings as to the personal negligence of the vessel owner in general, including findings as to Captain Svendsen's authority to bind the owner and as to the negligence or lack of it of Captain Wellton or any other representative of the vessel owner of such status that his negligence would be personal to the owner within the meaning of the Fire Statute. . . ." (273 F. 2d at 63)

The dissenting opinion by Clark, J., clearly expresses the view that the owner should have the burden of proving that he comes within the exemption of the fire statute, once negligence has been shown, but appears to erroneously assume that such view is repudiated by the majority opinion. 273 F. 2d at 65.

Luckenbach urges that no negligence of Sterling caused the fire and that Sterling did not know that the welding was to be done on the forward ladder in No. 5 hold (L. Br. 5). However, Sterling's negligence was in failing to provide an alternate source of water to the fire line (see Br. 34-36; 46). That negligence was a direct and proximate cause of the greater part of the damage, since the fire would have been

extinguished with minimal loss, if water had been available on the fire line. His failure to provide an alternate supply of water was a failure to exercise reasonable care regardless of where the welding was to be performed. Hence, Sterling's ignorance as to which ladder required repairs cannot relieve Luckenbach of the consequences of his negligence.

Luckenbach urges that Radovich, Luckenbach's marine superintendent, was a very minor employee (L. Br. 6) and that he emphatically was not a managerial officer (L. Br. 8). In describing Radovich's duties, counsel for Luckenbach, inadvertently no doubt, have used various descriptive words and phrases which are not found in the evidence. Radovich's "sole" function was not the hiring of longshore gangs and attending to the loading and discharge of cargo (L. Br. 6). He was Luckenbach's marine superintendent (R. 214).

Luckenbach concedes that Radovich's duties included the supervision of loading and discharge of cargo (L. Br. 6). Aside from any consideration of Radovich's other duties, the supervision of cargo loading and discharge is sufficient to establish Radovich's managerial status within the meaning of the fire statute. It was so held in *Williams SS Co.* v. *Wilbur* (CCA 9, 1925), 9 F. 2d 622, cited in Albina's Opening Brief (Br. 37, n.).

The *Williams* SS case, supra, was a libel to recover for fire damage to cargo. The trial court found that the proximate cause of the damage was improper stowage

and imperfect ventilation, and on appeal such finding was sustained. A decree for the libelant was affirmed, and the shipowner's contention that the fire statute provided a defense was rejected. Insofar as here pertinent, the holding on appeal was as follows:

> "The court below found that the method of stowage followed in this case was known to and acquiesced in by the general agent of the owner at Baltimore, who had supervision of the loading of cargo for the appellant for a period of three years. The appellant challenges this finding, but we think that it is supported by the testimony. * * * In addition to this, the appellant contends that the cargo now in question was stowed in the usual and customary manner. In the face of this testimony and this contention, it cannot be said that the owner was not responsible for the method of stowage adopted and followed, even though there is an absence of testimony tending to show that its managing officers or agents superintended the stowage of this particular cargo." (9 F. 2d at 622, 623)

If the shipowner's "general agent" had any duties other than the supervision of the loading of cargo, such other duties are not mentioned or relied upon in the opinion holding the shipowner chargeable with the agent's neglect. Thus, the *Williams* case clearly esablishes that in the instant case Radovich had managerial status, within the meaning of the fire statute; he instructed Albina to weld at the forward ladder, knowing that the flammable cargo had not been removed from the foot of the ladder, and his negligence is clearly attributable to Luckenbach.

Luckenbach contends that Radovich did not *order* Albina to repair the forward rather than the after ladder

(L. Br. 7, 8). The evidence speaks for itself, and counsel misses the point of Albina's reference to Radovich's conversation with Mr. Brewer of Albina relative to the location of the ladder needing repairs and the time when such repairs should be performed. Regardless of whether Radovich "ordered" or "notified" Albina to repair the forward ladder at the stated time, the significant fact is that Radovich clearly was aware that it was the forward rather than the after ladder which needed repair. Since it was his duty to coordinate the discharge of cargo with repair work, it was his responsibility to see that flammable cargo was cleared away from the area of the forward ladder. His negligence in failing to do so is chargeable to Luckenbach and was a contributing cause of the fire in the first instance.

Luckenbach also urges that Radovich had a right to delegate to Albina the duty of taking proper precautions to avoid a fire (L. Br. 8). This argument appears to be totally inconsistent with Luckenbach's contention that Radovich had no responsibility whatever with respect to seeing that welding could be performed with safety. He superintended the removal of cargo from the foot of the ladder and then advised Albina that it had been done—that it was now proper for Albina to proceed with the welding.

Luckenbach questions the fact that Sterling had ample opportunity, after removal of the section of the fire main, to determine whether an alternate water supply had been connected to the ship's fire line (L. Br. n., 9, 10). Sterling's own testimony clearly shows that he had

ample opportunity to determine what, if anything, had been done with regard to supplying water to the fire line. He himself testified (R. 327):

> "Q. . . . Now, when you left the vessel on the afternoon of 2 April, had the section of the fire main already been removed?
>
> A. Oh, yes; that was out in the morning."

Albina's Liability to Luckenbach

Counsel for Luckenbach saw fit to group together, for purposes of its answering brief, appellant's points III, IV and V, upon the basis that these points all relate to the question whether the District Court erred in holding Albina liable to Luckenbach (L. Br. 10).

Luckenbach urges that the welding could have been safely done if Albina's welders had taken proper precautions, and that accordingly there was no occasion for Radovich to take the precaution of removing any cargo (L. Br. 11). Its argument appears to be that because Albina was also negligent in not taking additional precautions, Radovich's dereliction of duty is excused, or should not constitute negligence. This argument is patently unsound.

Radovich knew (or was chargeable with knowledge) that there was flammable cargo within a few feet of the forward ladder. He "ordered" or notified" Albina to repair the forward ladder between 6:00 and 7:00 p.m., despite the proximity of the burlap and paper. He clearly violated 46 C.F.R., § 146.02-20, a regulation binding upon Luckenbach but not applicable to Albina (see Br.

57, 58), which prohibits welding or burning in cargo holds containing dangerous articles. Regardless of Albina's negligence, it appears clear that Radovich, in failing to see that the cargo was removed and in allowing the welding to proceed in proximity thereto, was negligent, not only for violation of the cited regulation but also for failure to exercise reasonable care under the circumstances. That negligence was a contributing cause of the fire.

Albina relied and had a right to rely on Luckenbach's undertaking that it would furnish an alternate supply of water to the fire lines. Albina had no obligation to ascertain whether Luckenbach had complied with its undertaking before welding in No. 5 hold. Luckenbach's failure to comply with its express undertaking cannot be disregarded as an active, effective cause of substantial damage to the cargo and all of the damage to the vessel.

Luckenbach has cited no authority, and it is believed that no authority is to be found, sustaining the proposition that the principles of the personal injury indemnity cases are applicable in a cargo damage case. As was pointed out in Albina's Opening Brief (Br. 71, 72), the considerations in the instant case are wholly different from those in the personal injury cases cited by Luckenbach (L. Br. 13, 14). The indemnity obligation in those cases arises out of implied contract. In the case at bar Luckenbach breached its express undertaking to supply water to the fire lines and it is obligated to indemnify Albina against claims of cargo that would

have been minimized or entirely avoided, had Luckenbach fulfilled its obligation.

Albina repaired the vessel at Luckenbach's request, and the trial court, in the face of all substantial evidence that the vessel would have sustained no damage, had water been available, dismissed Albina's libel.

CONCLUSION

Luckenbach has wholly failed to answer the issues raised by Albina on this appeal, and the Decree of the District Court should be reversed.

Respectfully submitted,

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GUNTHER F. KRAUSE,
ALAN H. JOHANSEN,
Proctors for Appellant,
Albina Engine & Machine Works, Inc.

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STATEMENT OF THE CASE

For convenience, the answering brief of appellees Hershey Chocolate Corporation, et al., will be referred to herein as "Cargo's Brief (C. Br.)", and appellant's opening brief will be referred to simply as "Brief (Br.)".

Counsel for the appellee cargo owners ("Cargo" herein) have included in their brief a supplementary "Statement of the Case" (C. Br. 2-18), the principal purpose of which seems to be to emphasize evidence tending to

show Albina's negligence. That portion of Cargo's brief serves no useful purpose, since in its opening brief Albina admitted that "there was competent evidence sustaining a finding that Albina's failure to take additional precautions proximately contributed to the start of the fire" (Br. 62).

Nevertheless, it is necessary to here point out some of the assertions found in Cargo's supplemental "Statement of the Case" which are incorrect or misleading.

Cargo asserts that Hebert, the vessel's Chief Engineer, relied on Albina to make the connection to supply shore water to the ship's fire line (C. Br. 7). The evidence fails to sustain any such contention (see Br. 11; 14, 15; 72). There was no order issued to Albina to supply dock water to the fire line. Sterling, Luckenbach's Port Engineer, understood that the ship's engineering department would take care of this task, as did Beutgen, the First Assistant Engineer, and Hebert's testimony to the effect that he had a rather vague "impression" that Albina would make the connection is not worthy of belief.

Under the general heading "Albina's Gross Negligence" Cargo urges that Albina did not notify the captain of the port prior to commencing welding, and that Luckenbach always relied on the contractor to give such notice (C. Br. 7).

It should be noted that the trial court correctly excluded from evidence the regulation requiring such notice, on the basis that such regulation applies only to welding on "waterfront facilities", and that a ship

is not a "waterfront facility" within the meaning thereof (R. 106-108). Further, the testimony of Ensign Beeler clearly refutes any suggestion that Albina, as opposed to Luckenbach, was under the primary obligation to give such notice. Beeler was the Coast Guard officer serving as Waterfront Security Officer and charged with the duty of running routine inspections of pier facilities, checking their equipment against regulations, etc. (R. 190). He testified that the regulation requiring such notice had recently been sent to designated facilities in the Portland area, including the Luckenbach Terminal (R. 197). He did not believe that copies of the regulation had at the same time been sent to ship repair contractors (R. 198). He expressed the belief that the primary responsibility for giving advance notice of welding was upon the owners and operators of vessels and waterfront facilities (R. 198, 199).

ARGUMENT

Degree of Albina's Fault

Counsel urges that Albina was "grossly negligent" in various particulars (C. Br. 18-22). Albina's negligence has been admitted, and the authorities fail to sustain counsel's contention that Albina was grossly negligent, if it were necessary to decide that question.

None of Albina's personnel had any connection whatever with creating the dangerous condition (i.e., proximity of the burlap), which was due to Luckenbach's failure to remove the cargo to a safe distance from the foot of the ladder.

In *Yoshizawa* v. *Hewitt* (CCA 9, 1931), 52 F. 2d 411, this Court said:

> " ' "Gross negligence" is that entire want of care which would raise a presumption of conscious indifference to consequences; an entire want of care, or such a slight degree of care as to raise the presumption of entire disregard for, and indifference to, the safety and welfare of others; the want of even slight care or diligence.' " (52 F. 2d at 413, citing authorities)

As was pointed out in Appellant's Opening Brief herein (Br. 62), Albina's welding foreman, after testifying as to the precautions which he took, said he believed that he had eliminated the danger of fire. There is no evidence tending to suggest that he was insincere in such belief. Surely it cannot be said that under such circumstances Albina is to be charged with "that entire want of care which would raise a presumption of conscious indifference to consequences."

In the instant case, Albina is chargeable with fault only in proceeding with the welding without taking additional precautions. Albina's welding foreman believed, albeit mistakenly, that he had eliminated the danger of fire. If gross negligence were an issue in the case, which it is not (see parties' contentions, Consolidated Pretrial Order, R. 56-69), the District Court clearly erred in characterizing Albina's conduct as "gross negligence" (Finding IV, R. 87; Finding XIII, R. 89).

Extent of Albina's Liability for Cargo Damage

In urging that Albina is liable to Cargo for all damage from the fire (C. Br. 22-31), Cargo argues that Albina relies solely upon the opinion testimony of its welding crew to establish that the fire could have been extinguished with slight damage if water had been quickly available (C. Br. 24, note 16). This obvious fact is supported not only by what counsel characterizes as "opinion testimony of the welding crew," but by the factual testimony and by the testimony of independent witnesses.

As was pointed out in appellant's opening brief (Br. 12, 13), Larson could see how big the fire was before he came up out of the hold and could see where it was burning; at the time he left the hold, the fire was confined to bales of burlap in an area about eight feet long, 39 inches wide and 40 inches high. There was no fire in any of the paper cargo at that time. When he left the hold, he had been waiting for about six minutes after the start of the fire for water to come through the hose.

None of the testimony regarding the extent of the fire at the time was contradicted. No reliance need be placed on any "opinion testimony," nor are any occult powers of divination necessary, in order to believe that the fire could have been extinguished with a minimum of damage had water, which Luckenbach had undertaken to provide, been available in the fire line. The fire hose had been lowered into the hold within two minutes after the outbreak of the fire (R. 528, 555).

Larson's opinion that he could have put the fire out if water had been available in the fire hose was confirmed by the testimony of Assistant Fire Chief Kenneth Post of the Portland Fire Department, who expressed the view that a small hose line would surely have put the fire out when it started (R. 407).

Cargo also urges that the doctrine of avoidable consequences is wholly inapplicable to Cargo (C. Br. 26). Assuming, arguendo, that such assertion is correct, this still does not mean that Cargo is entitled to recover for more than the damage proximately resulting from Albina's negligence.

A pertinent decision in this connection is *Sinram* v. *Pennsylvania R. Co.* (CCA 2, 1932), 61 F. 2d 767, where it appeared that a tug's negligence caused collision damage to a barge. The bargee negligently allowed the barge to be loaded without determining the extent of the collision damage, and the barge subsequently sank, with damage not only to the barge but to her cargo. The barge owner sued the tug, and the cargo underwriter intervened. The lower court allowed full recovery to both the barge owner and cargo.

On appeal, the court held that the owner of the barge could not recover for more than the original collision damage, the damage caused by sinking being barred by the owner's neglect in properly caring for the barge after the original damage had occurred. The tug was relieved of responsibility for unforeseeable damage to cargo.

Here, Albina should have foreseen some damage to

cargo if it allowed a fire to start in the burlap immediately adjacent to the forward ladder. However, Albina cannot be charged with the duty of foreseeing that Luckenbach would disregard its undertaking to maintain adequate water in its fire lines, which resulted in extensive damage to cargo in the after part of No. 5 hold, in the No. 4 hold, and structural damage to the ship itself.

In the *Sinram* case, supra, the remedy of the cargo owners or underwriters was against the barge and her owners; here, the remedy of the owners of cargo other than the burlap and construction paper is against Luckenbach.

Applicability of Ordinance and Coast Guard Regulations

In attempting to discredit appellant's contention that the Portland City ordinance is invalid, Cargo asserts that Albina claims that the Coast Guard regulation which forbids welding near hazardous cargo (46 C.F.R. § 146.02-20) is not applicable to the case (C. Br. 33, n.). Albina does not now and has never taken the position that such Coast Guard regulation is wholly inapplicable to the case. Albina's position with respect to the applicability of the Portland City ordinance and the various Coast Guard regulations is stated in its brief (Br. 60).

Cargo also urges, in effect, that the city ordinance does not conflict with 46 C.F.R. 146.02-20 in that the ordinance and the regulation deal, respectively, with different subject matters (C. Br. 35). Such argument is wholly untenable. The subject matter of the ordin-

ance and of the regulation is welding in the holds of vessels. There is no question but that both the ordinance and the Coast Guard regulations, to the extent applicable at all, were applicable to the SS ROBERT LUCKENBACH. (Cf., *Kelly* v. *State of Washington ex rel Foss,* 302 U.S. 1, 82 L. Ed. 3 (1937)).

The Coast Guard regulation in question provides that there shall be no welding in cargo holds under the designated conditions. By clear and necessary implication, the regulation permits welding in the absence of the designated conditions. The city ordinance attempts to go further and impose additional conditions and restrictions as to when welding may and may not be undertaken in the holds of vessels, making the ordinance clearly invalid under the *Kelly* case, supra (see Br. 53).

The authorties cited by Cargo (C. Br. 36-39) in support of its contention that the Portland City ordinance is valid are not in point, since none involved situations where it was necessary to determine whether federal and local enactments applicable to the same subject matter, and designed for the same purpose, were in conflict.

In *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440, 4 L. Ed. 2d 852 (1960), in holding that the local enactment did not conflict with federal regulations, the court noted that the two enactments had altogether different purposes. The court said:

> "As is apparent on the face of the legislation, however, the purpose of the federal inspection statutes is to insure the sea-going safety of vessels subject to inspection. * * * The thrust of the federal inspection laws is clearly limited to affording

> protection from the perils of maritime navigation. * * *
>
> "By contrast, the sole aim of the Detroit ordinance is the elimination of air pollution to protect the health and enhance the cleanliness of the local community." (362 U.S. at 445, 4 L. Ed. 2d at 857)

In the instant case, however, the manifest purpose of both the Coast Guard regulation and the Portland City ordinance is fire prevention aboard vessels. Since, in seeking to prevent fires aboard vessels, the city goes further than the federal regulations, and imposes additional burdens, restrictions and conditions, the local enactment squarely conflicts with the federal regulations and must be held invalid.

It is interesting to note that Cargo urges that the city ordinance relates to a matter which is not and should not be regulated by the Coast Guard regulations (C. Br. 39), and then immediately proceeds with a discussion of Coast Guard regulations which, it is contended by Cargo, were applicable to and violated by Albina. Since both the ordinance and the Coast Guard regulations relate to welding on vessels, it is difficult to see why, if that subject is not and should not be subject to Coast Guard regulations, counsel deems it necessary to discuss the Coast Guard regulations at all.

In any event, Cargo urges that Albina contends that it was free to conduct welding operations near hazardous cargo even though the ship is not (C. Br. 40). This, again, is an inaccurate statement of Albina's position. It is appellant's position that the Coast Guard regulation is not applicable to nor binding upon Albina,

and that hence such regulation is not determinative of the question whether Albina was negligent in welding where it did. It may be conceded that, independently of the regulation, Albina might be held negligent to have undertaken to perform welding in proximity to the burlap. However, Albina's negligence must be decided upon the usual considerations of reasonable care under the circumstances. Since the regulation was not applicable to Albina, no violation thereof by Albina can be deemed negligence per se.

Cargo then advances a strange argument to the effect that Albina's "use" of unspecified dangerous articles and substances in the welding operation constituted a "handling" of dangerous articles or substances within the meaning of the federal regulations (C. Br. 40). It is clear that the federal regulations defining and classifying dangerous articles and substances have reference to cargo. See 46 C.F.R., subchapter 146.27. The testimony of Ensign Beeler indicates that the Coast Guard's practical construction of these regulations was to the effect that the classification of various articles and substances as hazardous or dangerous relates to cargo (R. 194). It is clear that Albina neither "used" or "handled" any cargo whatever, nor are we advised of any specific articles or substances used or handled by Albina which are classified as dangerous or hazardous by any federal regulations.

CONCLUSION

Cargo, it is to be observed, does not contend that Luckenbach is not liable for the cargo damage. On the contrary, "Cargo was and is still of the opinion that the fire resulted from the concurring fault and negligence of Albina and Luckenbach's managing officers and agents." (C. Br. 2, 3).

Cargo's brief, as pointed out herein, includes various incorrect and inaccurate statements of fact and of law, and reveals various misapprehensions as to appellant's position. Both Cargo and Luckenbach have failed to show any valid reason why the decree should not be reversed, with directions to apportion total cargo loss between Albina and Luckenbach in proportion to fault and to allow Albina to recover from Luckenbach the cost of repairs to the vessel.

Respectfully submitted,

KRAUSE, LINDSAY & NAHSTOLL,
GUNTHER F. KRAUSE,
ALAN H. JOHANSEN,
Proctors for Appellant,
Albina Engine & Machine Works, Inc.

No. 17070

United States
Court of Appeals
for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC., an Oregon Corporation,

Appellant,

vs.

HERSHEY CHOCOLATE CORPORATION, a Delaware Corporation, et al.,

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 312)

Appeal from the United States District Court for the District of Oregon.

Phillips & Van Orden Co., 4th & Berry, S. F., Calif.—Rec. 11/14/60—Printed 12/30/60

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court
for the District of Oregon

Civil No. 9997

HERSHEY CHOCOLATE CORPORATION, a Delaware Corporation,

Libelant,

vs.

THE S. S. ROBERT LUCKENBACH, Her Engines, Tackle, Apparel and Furniture, LUCKENBACH STEAMSHIP COMPANY, INC., a Delaware Corporation, and ALBINA ENGINE & MACHINE WORKS, INC., an Oregon Corporation,

Respondents.

LIBEL IN REM AND IN PERSONAM FOR CARGO DAMAGE

To the Honorable Claude McColloch, Gus J. Solomon and William G. East, Judges, of the Above-Entitled court:

The libel of Hershey Chocolate Corporation in a cause for cargo damage, civil and maritime, against the S. S. Robert Luckenbach, her engines, tackle, apparel and furniture, Luckenbach Steamship Company, Inc., a Delaware corporation, and Albina Engine & Machine Works, Inc., an Oregon corporation, alleges:

Article I.

Libelant is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware.

Article II.

The S. S. Robert Luckenbach is an ocean-going cargo vessel Registry No. 245923, with gross tonage of 7,882 tons.

Article III.

Luckenbach Steamship Company, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and is the owner of the S. S. Robert Luckenbach.

Article IV.

Albina Engine & Machine Works, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon.

Article V.

On or about the 26th day of February, 1958, certain cargo owned by Hershey Chocolate Corporation consisting of confectionery cocoa and chocolate syrup and consigned to itself at Portland, Oregon, then in good order and condition, was delivered to Luckenbach Steamship Company, Inc., at Philadelphia, Pennsylvania, and loaded aboard said vessel to be transported within a reasonable period of time, in like good order and condition, to Portland, Oregon, in consideration of agreed freight and in ac-

cordance with the terms and conditions of the bill of lading then and there issued by Luckenbach Steamship Company, Inc., to Hershey Chocolate Corporation.

Article VI.

Thereafter said vessel, having on board the above-described cargo, departed for Portland, Oregon, said voyage being designated as Voyage L-910. On April 2, 1958, while in port in Portland, Oregon, the said vessel was undergoing minor repairs performed and to be performed by respondent, Albina Engine & Machine Works, Inc.

Article VII.

On said date and as a proximate result of the many faults and the negligence of respondents, and each of them, concurring and combining, and of the personal failures and the negligence of the owner of the vessel, to the knowledge and privity of said owner, a fire occurred aboard said vessel causing as a direct and natural consequence thereof, damage to said cargo.

Respondent, Luckenbach Steamship Company, Inc., in breach of the terms of its shipping contract, failed to thansport said cargo and to deliver the same at the port of destination, or elsewhere, in like good order and condition.

Article VIII.

Respondent, Luckenbach Steamship Company, Inc., failed to make said vessel tight, staunch, strong

and ready for the performance of its services as contemplated, and the loss and damage to said cargo was caused by the negligence of Luckenbach Steamship Company, Inc., its agents, servants and employees, in failing to provide a seaworthy vessel for carriage of said cargo to the knowledge and privity of Luckenbach Steamship Company, Inc., in the following particulars, among others:

1. Said vessel was generally unseaworthy.

2. Said vessel was manned by an insufficient number of officers and crew, several being unqualified as to rating, most being unacquainted with essential equipment aboard, many being uninstructed as to their respective duties.

3. A section of the main fire line had been removed and not replaced, nor was any alternative fire control system established.

4. The fire system control was inoperative.

Article IX.

Respondent, Luckenbach Steamship Company, Inc., through its servants, agents, employees and personnel, both officers and men, was guilty of negligence in the following particulars, among others:

1. It removed a section of the main fire line.

2. It failed to establish an alternative water connection after the fire main had been removed.

3. It failed to report to all hands that the fire system was inoperative.

4. It permitted welding aboard said vessel, knowing that the fire system was inoperative.

5. It failed to establish a shoreside connection to the fire control system.

6. It permitted and allowed welding to be performed aboard the vessel, particularly in Hold No. 5, when the same was loaded with hazardous articles.

7. It permitted and allowed welding to be performed aboard the vessel when the same was improperly supervised.

8. It permitted and allowed welding to be performed aboard the vessel when there was no suitable fire hose with nozzle attached connected to a nearby fire hydrant.

9. It permitted and allowed welding to be performed aboard the vessel without there being then and there present a competent attendant equipped with not less than one four-pound CO2 fire extinguisher at hand and ready for instant use.

10. It failed to station a fire watch at the site of the welding operation.

Article X.

Respondent Albina Engine & Machine Works, Inc., was guilty of fault and negligence in the following particulars, among others:

1. It performed welding aboard the vessel without having first ascertained whether the vessel was equipped with a fire control system in good operating order.

2. It performed welding aboard the vessel, and particularly in Hold No. 5, in the presence of hazardous articles, without a suitable fire hose with nozzle attached connected to a nearby fire hydrant.

3. It permitted and allowed welding sparks to ignite the cargo in said hold.

4. It failed to properly supervise the welding operations.

5. It failed to maintain a fire watch.

6. It failed to have present during welding operations under such circumstances then and there attendant, a competent attendant equipped with not less than one four-pound CO2 fire extinguisher at hand and ready for instant use.

7. It failed to properly screen the welding operations.

Article XI.

The unseaworthiness of the vessel, the faults and negligence, both personal and otherwise, of her owner, and the faults and negligence of Albina Engine & Machine Works, Inc., concurring together and acting in concert, constituted the sole, proximate, contributing and concurring causes of the fire

and the loss and damage to said cargo in the foregoing particulars, and in particulars undisclosed at the present time. Libelant reserves the right of amendment hereto in harmony with the proof thereof.

Article XII.

By reason of the premises, libelant has sustained damages in the total sum of $9,038.49 with interest accruing thereon at the legal rate until paid; that no credits exist upon or against said total sum and no payments have been made thereon, recovery of which is asserted against respondents, and each of them.

Article XIII.

All and singular, the premises are true and within the admiralty and maritime jurisdiction of this court.

Wherefore, libelant prays that process in due form of law in accordance with the practice of this honorable court may issue against the vessel, the S. S. Robert Luckenbach, her engines, tackle, apparel and furniture, and that she may be condemned and sold to answer for the damages alleged in this libel, and that this court hear the evidence which libelant will produce in support of the allegations of this libel, or any amendment thereto, and will enter a decree in favor of libelant and will order the same to be paid and satisfied out of the said proceeds of the vessel, the S. S. Robert Luckenbach.

That process in due form of law, according to the practices of this honorable court in causes of admiralty and maritime jurisdiction, issue against the Luckenbach Steamship Company, Inc., and against Albina Engine & Machine Works, Inc., and each of them, citing them, and each of them, to appear and answer on oath all matters and things aforesaid and be required to deposit security for all damages sustained, and that this honorable court may adjudge and decree that respondents, Luckenbach Steamship Company, Inc., and Albina Engine & Machine Works, Inc., pay to libelant its damages as aforesaid with interests and costs.

Libelant further prays that this honorable court grant to it such other and further relief as it may deem meet and proper in the premises.

KOERNER, YOUNG,
McCOLLOCH & DEZENDORF,

/s/ JOHN GORDON GEARIN,
Proctors for Libelant.

Duly verified.

[Endorsed]: Filed September 19, 1958.

In the United States District Court
for the District of Oregon

Civil No. 9997

HERSHEY CHOCOLATE CORPORATION, a Delaware Corporation,

Libelant,

vs.

The SS ROBERT LUCKENBACH, her Engines, Tackle, Apparel and Furniture, LUCKENBACH STEAMSHIP COMPANY, INC., a Delaware Corporation, and ALBINA ENGINE & MACHINE WORKS, INC., an Oregon Corporation,

Respondents.

LUCKENBACH STEAMSHIP COMPANY, INC., a Corporation,

Cross-Claimant,

vs.

ALBINA ENGINE & MACHINE WORKS, INC., an Oregon Corporation,

Cross-Respondent.

ANSWER OF LUCKENBACH STEAMSHIP COMPANY, INC., AND CROSS-CLAIM AGAINST ALBINA ENGINE & MACHINE WORKS, INC.

To the Honorable Claude McColloch, Gus J. Solomon and William G. East, Judges of the Above-Entitled Court:

The answer of Luckenbach Steamship Company, Inc., to the libel herein, admits, denies and alleges as follows:

Article I.

Admits the allegations of Article I.

Article II.

Admits the allegations of Article II.

Article III.

Admits the allegations of Article III.

Article IV.

Admits the allegations of Article IV.

Article V.

Admits the allegations of Article V, except the allegation that the said cargo was delivered to the ship in good order and condition, as to which respondent has no knowledge; and therefore denies, but admits that the packages were delivered in apparent good order and condition.

Article VI.

Admits the allegations of Article VI.

Article VII.

Answering Article VII, respondent denies the same, except as hereinafter admitted.

Article VIII.

For answer to Article VIII, respondent denies the same.

Article IX.

For answer to Article IX, respondent denies the same.

Article X.

For answer to Article X, since the allegations therein are solely against Albina Engine & Machine Works, Inc., this respondent neither admits nor denies the same, but leaves those matters to the proofs.

Article XI.

For answer to Article XI, insofar as the allegations therein are against this respondent, respondent denies the same.

Article XII.

For answer to Article XII, respondent denies knowledge or information sufficient to form a belief as to the allegations therein.

Article XIII.

For answer to Article XIII, respondent denies that the premises are true, but admits the jurisdiction of the Court.

For a further and separate answer and defense, respondent alleges as follows:

That on or about April 2nd, 1958, while the steamship Robert Luckenbach was lying in Port-

land Harbor at the Luckenbach Dock, certain repairs necessitating welding were being done to a ladder in No. 5 hold, by the respondent Albina Engine & Machine Works, Inc., and that in consequence of said welding operations fire broke out in the cargo in No. 5 hold, and certain damage was incurred as a result of the fire and water used to extinguish it. Respondent admits that at the time of the fire a section of the main fire line in the engine room had been removed, and that no water connection had been made with the hydrant on the dock, but alleges that the removal of the said section did not render the ship's fire system inoperative since there were alternate pipelines of the fire system that were still usable, notwithstanding the removal of the said section, and that, in any event, no act or omission of respondents was the cause of the fire, but that the real proximate cause was the negligence of Albina Engine & Machine Works, Inc., in the manner in which it conducted the welding operations, as hereinafter alleged in the following cross-claim against it.

For a second, further and separate answer and defense, respondent alleges as follows:

The said fire was caused without any design or neglect of respondent, and the respondent claims the benefit of Section 4282 of the Revised Statutes; Section 182 of Title 46, U.S.C. (the Fire Statute), which is also incorporated in clause 13 of the bill of lading under which these goods were shipped, and by virtue of the foregoing this respondent al-

leges that it is not liable for any of the consequent damage to libelant's merchandise which was shipped on said vessel.

For a third, further and separate answer and defense, respondent alleges as follows:

In clause 17 of the bill of lading under which said merchandise was shipped, it is provided that neither carrier nor vessel (i.e., this respondent) shall be liable for any loss, damage or delay arising from "fire from any cause on land or on water, whether on board ship, on cars, lighters, in warehouse or on wharves or elsewhere; water or steam or chemicals used for the purpose of extinguishing fire;" and this respondent claims the benefit of said clause and alleges that by virtue thereof it is not liable for the damage to libelant's merchandise.

For a fourth, further and separate answer and defense, respondent alleges as follows:

Clause 18 of the bill of lading under which said goods were shipped is as follows: "It is hereby mutually agreed that the shipper of the goods has been given a choice of freight rates as per tariff published, for the transportation of the goods covered by this bill of lading and that the freight on the goods is based upon the declared value of said goods. The shipper declares and agrees that, unless a different valuation is stated in this bill of lading and freight paid thereon as per tariff, the value of said goods is not more than $500.00 per piece or package, and in no case more than the invoice

value of said goods at point of shipment, and in the case of shipments moving under released rates, as provided for in the tariff, liability shall not exceed the provision of such released rates and in no case be in excess of the invoice value at point of shipment as provided for herein. And it is further agreed that all claims for loss, damage or delay for which the shipowner or charterer may be liable shall be adjusted upon the basis of value declared herein, or proportionate part thereof in case of partial loss or damage; provided, however, that in no case shall the shipowner or charterer be liable for any loss or damage in excess of the actual pecuniary loss or damage sustained by the shipper, owner or consignee."

Respondent further alleges that libelant was given a choice of freight rates, as provided in said clause, and did not declare any different valuation as provided in said clause, and that in no event can respondent be liable for more than $500.00 per piece or package of said merchandise, or the invoice value of said goods at point of shipment.

Cross-Claim

Further answering, and by way of cross-claim against Albina Engine & Machine Works, Inc., Luckenbach Steamship Company, Inc., alleges as follows:

Article I.

Cross-Claimant, Luckenbach Steamship Company, Inc., employed Albina Engine & Machine

Works, Inc., as an independent contractor to do certain welding repairs on a ladder in No. 5 hold of the steamship Robert Luckenbach, and Albina Engine & Machine Works, Inc., undertook said work on April 2nd, 1958.

Cross-respondent Albina Engine & Machine Works, Inc., sent its welders aboard the said ship, and they entered the said No. 5 hold and began the said welding operations, with only 2 men and without a fire watch, and without any water available in quantity to put out any fire, or means of spraying water upon any fire that might break out, and without screening their welding operations from adjacent cargo, and without notifying any officers of the ship that they were about to conduct said welding operations. Fire broke out in the cargo of No. 5 hold as a result of the sparks from the welding, and the cargo was considerably damaged by burning and also by the water subsequently used to put it out, and cargo was also damaged in No. 4 hold by water directed into said hold to prevent the cargo therein from being ignited by the heat engendered in the bulkhead between No. 4 and No. 5 holds as a result of the fire in No. 5 hold.

Article II.

Cross-respondent Albina Engine & Machine Works, Inc., breached its contract to perform the said welding operations with reasonable safety, and was negligent in the following particulars, and the said breach and the said negligence were the sole

and proximate cause of the damage which is the subject of this suit,

(1) It boarded the vessel and commenced said welding operations without any notice to any of the ship's officers that it was about to do so, and without ascertaining the condition of the fire control system on the ship.

(2) It performed the welding in No. 5 hold in the presence of hazardous articles, without any water of any kind available except a small can containing perhaps 2 gallons, which was entirely inadequate to put out any fire, and without any other means of extinguishing a fire.

(3) It did not screen off the welding operations from adjacent cargo, or in any way isolate them from the cargo, and permitted and allowed welding sparks to ignite the cargo in said hold.

(4) It failed to properly supervise the welding operations.

(5) It failed to maintain a fire watch.

(6) It failed to have present during welding operations a competent attendant equipped with not less than one 4-pound CO2 fire extinguisher at hand and ready for instant use.

Article III.

The aforesaid acts and conduct of cross-respondent Albina Engine & Machine Works, Inc., in breach of its contract, and negligent as aforesaid, were the sole proximate cause of the damage to

said cargo but if, on the proofs as finally submitted, the Court should be of the opinion that this respondent, Luckenbach Steamship Company, Inc., is in any way liable for all or part of the damage, then this respondent, as cross-claimant against Albina Engine & Machine Works, Inc., alleges that the real, active cause of the damage was Albina's breach of contract and negligence as aforesaid, and claims indemnity over or contribution from Albina, or a division of damages, all as to the Court may seem to be warranted by the proofs.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, respondent and cross-claimant, Luckenbach Steamship Company, Inc., prays that libelant take nothing, or that if any damages are awarded against this respondent, then in that event it may recover over by way of indemnity or contribution from cross-respondent, Albina Engine & Machine Works, Inc., together with its costs and disbursements, and for such other, further and different relief as to the Court may seem just and in accordance with the admiralty practice.

WOOD, MATTHIESSEN,
WOOD & TATUM,

/s/ ERSKINE WOOD,
Proctors for Luckenbach
Steamship Company, Inc.

Duly verified.

[Endorsed]: Filed November 17, 1958.

[Title of District Court and Cause.]

Civil No. 9997

ANSWER OF RESPONDENT ALBINA ENGINE & MACHINE WORKS, INC.

To: The Honorable Gus J. Solomon and William G. East, Judges of the Above-Entitled Court:

The answer of Albina Engine & Machine Works, Inc., to the libel herein, admits, denies and alleges:

Article I.

For answer to Articles I, II, III and IV of the libel, this respondent admits the allegations thereof.

Article II.

For answer to Article V, this respondent lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof, and therefore denies the same.

Article III.

For answer to Article VI, this respondent admits that on April 2, 1958, while in port at Portland, Oregon, the SS Robert Luckenbach was undergoing certain repairs performed and to be performed by this respondent, but respondent lacks knowledge or information sufficient to form a belief as to the truth or falsity of the other allegations of Article VI, and therefore denies the same.

Article IV.

For answer to Article VII, this respondent admits that on April 2, 1958, a fire occurred aboard the SS Robert Luckenbach and that some cargo, the ownership of which is unknown to this respondent, was damaged therein, but denies the remaining allegations of Article VII insofar as they are directed against this respondent.

Article V.

For answer to Article VIII, this respondent admits that Luckenbach Steamship Company, Inc., failed to provide a seaworthy vessel in the particulars alleged therein, among others.

Article VI.

For answer to Article IX, this respondent admits that Luckenbach Steamship Company, Inc., was guilty of negligence in the particulars alleged therein, among others.

Article VII.

For answer to Article X, this respondent denies the same.

Article VIII.

For answer to Article XI, insofar as the same is directed against this respondent, this respondent denies the same.

Article IX.

For answer to Article XII, this respondent lacks knowledge or information sufficient to form a belief

as to the truth or falsity of the allegations therein, and therefore denies the same.

Article X.

For answer to Article XIII, this respondent admits the jurisdiction of this Honorable Court but denies the truth of the allegations of the libel, except as to those hereinbefore expressly admitted or qualified.

For a further and separate answer and defense, this respondent alleges:

Article I.

On or about April 2, 1958, while the SS Robert Luckenbach was berthed at the Luckenbach dock in the harbor at Portland, Oregon, this respondent, at the request of Luckenbach Steamship Company, Inc., was engaged in certain repair work aboard said vessel. These repairs included certain work involving welding on a ladder in the No. 5 hold. Respondent Luckenbach Steamship Company undertook to remove all cargo from the area of said ladder before the time when said welding was to be performed. At the time this respondent came aboard to commence welding, all cargo had been removed from an area surrounding the ladder. This respondent proceeded to commence its welding operation in reliance on Luckenbach Steamship Company's undertaking to remove cargo to the extent deemed by it to be necessary.

Article II.

While said welding was being performed, with proper precautions by this respondent and without any fault or neglect whatever by this respondent, a fire broke out in certain cargo in No. 5 hold. The fire would have been extinguished before any significant damage occurred were it not for the unseaworthiness of the SS Robert Luckenbach and the fault and neglect of the respondent Luckenbach Steamship Company and its officers and agents, as hereinafter more fully alleged.

Article III.

Respondent Luckenbach Steamship Company, Inc., failed to make the SS Robert Luckenbach tight, staunch, strong and ready for the performance of its services, and any loss or damage to the cargo of the libelants was caused by the negligence of Luckenbach Steamship Company, Inc., its agents, servants and employees, in failing to provide a seaworthy vessel for the carriage of libelants' cargo, and other cargo aboard said vessel, to the knowledge and privity of Luckenbach Steamship Company, Inc., in the following particulars, among others:

1. Said vessel was generally unseaworthy.

2. Said vessel was manned by an insufficient number of officers and crew, several being unqualified as to rating, most being unacquainted with essential equipment aboard, and many being uninstructed as to their respective duties.

3. No alternative fire control system was established after a section of the main fire line was removed.

4. The ship's fire line was not connected to a readily accessible fire hydrant on the adjacent dock.

Article IV.

Respondent Luckenbach Steamship Company, Inc., through its officers, agents, employees and personnel, was guilty of negligence in the following particulars, among others:

1. It failed to establish an alternative water connection after a section of the main fire line had been removed.

2. It failed to report to all hands that the fire system was inoperative.

3. It failed to establish a connection to the ship's fire line from a nearby fire hydrant on the adjacent dock, although such connection could have been simply and conveniently made.

4. It failed to provide a suitable and operable fire hose, with nozzle attached, at the time and place where it knew welding was to be performed.

5. It failed to inform this respondent's welding crew that the main fire line was inoperative.

Article V.

All and singular, the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, respondent Albina Engine & Machine Works, Inc., prays that the libelant take nothing herein and that this respondent recover its costs and disbursements incurred herein and for such other and further relief as to the Court may seem just and in accordance with the admiralty practice.

KRAUSE, LINDSAY,
NAHSTOLL & KENNEDY,

/s/ GUNTHER F. KRAUSE,
Proctors for Respondent Albina Engine & Machine Works, Inc.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 9, 1959.

[Title of District Court and Cause.]

ANSWER TO CROSS-CLAIM AND CROSS-LIBEL AGAINST LUCKENBACH STEAMSHIP COMPANY, INC.

To: The Honorable Gus J. Solomon and William G. East, Judges of the Above-Entitled Court:

The answer of Albina Engine & Machine Works, Inc., to the cross-claim of Luckenbach Steamship Company, Inc., herein, admits, denies and alleges:

Article I.

For answer to Article I of the cross-claim, admits that cross-claimant Luckenbach Steamship

Company, Inc., employed Albina Engine & Machine Works, Inc., to do certain repair work on a ladder in No. 5 hold of the S.S. Robert Luckenbach and that Albina Engine & Machine Works, Inc., undertook to perform said repair work on April 2, 1958, and that a fire occurred in No. 5 hold while said repair work was in progress and denies the remaining allegations thereof.

Article II.

For answer to Article II of the cross-claim, denies the same.

Article III.

For answer to Article III of the cross-claim, denies the same.

Further answering and for cause of suit against Luckenbach Steamship Company, Inc., Albina Engine & Machine Works, Inc., alleges as follows:

Article I.

On or about April 2, 1958, cross-respondent Luckenbach Steamship Company, Inc., engaged Albina Engine & Machine Works, Inc., to do certain repair work on a ladder in No. 5 hatch of the S.S. Robert Luckenbach while said vessel was berthed at Luckenbach Dock in the harbor at Portland, Oregon. The nature of the said repairs necessarily required that this cross-libelant perform welding on and about said ladder, as cross-respondent Luckenbach

Steamship Company, Inc., fully realized and contemplated. Cross-libelant was instructed by cross-respondent to perform said work between the hours of 6:00 p.m. and 7:00 p.m. on April 2, 1958, and cross-respondent Luckenbach Steamship Company, Inc., undertook to have all cargo removed from the area of the ladder requiring repair work prior to the time when the welding was to be performed.

Cargo was removed from an area surrounding the ladder where welding was to be performed prior to about 6:00 p.m. on April 2, 1958, at which time the employees of cross-libelant came aboard the said vessel to perform said welding. Cross-libelant relied on cross-respondent's undertaking to remove cargo to the extent deemed by cross-respondent to be necessary. Cross-libelant took additional and proper precautions to avoid the starting or spreading of any fire in said vessel or cargo, and commenced to perform the necessary repairs on said ladder.

Despite such proper precautions taken by this cross-libelant and without any fault or neglect whatever by this cross-libelant, a fire broke out in said cargo; thereupon, cross-libelant's employees took immediate and proper steps in an attempt to put out the said fire before any significant damage occurred, and would have been able to do so were it not for the unseaworthiness of the S.S. Robert Luckenbach, its gear, tackle and appliances, and for the fault and neglect of the Luckenbach

Steamship Company, Inc., its officers, agents, employees and other personnel as will hereinafter more fully appear. As the sole and proximate result of said unseaworthiness and fault of the cross-respondent Luckenbach Steamship Company, Inc., no water was available in the ship's fire lines; such unseaworthiness and neglect by cross-respondent directly and proximately caused the fire to spread, resulting in any damage or loss which libelant herein may have sustained.

Article II.

Cross-respondent Luckenbach Steamship Company, Inc., failed to make the S.S. Robert Luckenbach tight, staunch, strong, and ready for the performance of its services, and any loss or damage to the cargo of the libelants herein was caused by the negligence of Luckenbach Steamship Company, Inc., its agents, servants and employees in failing to provide a seaworthy vessel for the carriage of libelant's cargo, and other cargo aboard said vessel, to the knowledge and privity of Luckenbach Steamship Company, Inc., in the following particulars, among others:

1. Said vessel was generally unseaworthy.

2. Said vessel was manned by an insufficient number of officers and crew, several being unqualified as to rating, most being unacquainted with essential equipment aboard, and many being uninstructed as to their respective duties.

3. No alternative fire control system was established after a section of the main fire line was removed.

4. The ship's fire line was not connected to a readily accessible fire hydrant on the adjacent dock.

Article III.

Cross-respondent Luckenbach Steamship Company, Inc., through its officers, agents, employees and personnel, was guilty of negligence in the following particulars, among others:

1. It failed to establish an alternative water connection after a section of the main fire line had been removed.

2. It failed to report to all hands that the fire system was inoperative.

3. It failed to establish a connection to the ship's fire line from a nearby fire hydrant on the adjacent dock, although such connection could have been simply and conveniently made.

4. It failed to provide a suitable and operable fire hose, with nozzle attached, at the time and place where it knew welding was to be performed.

5. It failed to inform this cross-libelant's welding crew that the main fire line was inoperative.

Article IV.

The negligent acts and conduct of cross-respondent Luckenbach Steamship Company, Inc., and the

unseaworthiness of the S.S. Robert Luckenbach, as aforesaid, were the sole and proximate cause of any damage to the cargo of libelant herein. However, if on the proofs as finally submitted the Court should be of the opinion that cross-libelant is in any way liable for all or any part of such damage as libelant herein may have sustained, then this respondent, as cross-libelant against Luckenbach Steamship Company, Inc., alleges that there would have been no damage to libelant's cargo, or to any cargo, except for the negligence of the cross-respondent Luckenbach Steamship Company, Inc., and the unseaworthiness of the vessel, as aforesaid. Cross-libelant therefore claims indemnity over or contribution from Luckenbach Steamship Company, Inc., or a division of damages, as the Court may deem to be warranted by the proofs.

Article V.

All and singular, the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, respondent and cross-libelant Albina Engine & Machine Works, Inc., prays that Luckenbach Steamship Company, Inc., take nothing on its cross-claim, and that if any damages to libelant are awarded against this respondent and cross-libelant, then and in that event, this respondent and cross-libelant may recover over by way of indemnity or contribution from cross-respondent Luckenbach Steamship Company, Inc., together

with its costs and disbursements, and for such other, further and different relief as to the Court may seem just and in accordance with the admiralty practice.

KRAUSE, LINDSAY,
NAHSTOLL & KENNEDY,

/s/ GUNTHER F. KRAUSE,
Proctors for Respondent and Cross-Libelant Albina Engine & Machine Works, Inc.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 9, 1959.

In the United States District Court
for the District of Oregon

Civil No. 10,002

ZELLERBACH PAPER COMPANY, a California Corporation, and NORTHWEST GROCERY COMPANY, an Oregon Corporation,

Libelants,

vs.

The S.S. ROBERT LUCKENBACH, Her Engines, Tackle, Apparel and Furniture; LUCKENBACH STEAMSHIP COMPANY, INC., a Delaware Corporation, and ALBINA ENGINE & MACHINE WORKS, an Oregon Corporation,

Respondents.

LUCKENBACH STEAMSHIP COMPANY, INC., a Delaware Corporation,

Cross-Claimant and Cross-Respondent,

vs.

ALBINA ENGINE & MACHINE WORKS, INC., an Oregon Corporation,

Cross-Respondent and Cross-Libelant.

ANSWER TO CROSS-CLAIM AND CROSS-LIBEL AGAINST LUCKENBACH STEAMSHIP COMPANY, INC.

To: The Honorable Gus J. Solomon and William G. East, Judges of the Above-Entitled Court:

The answer of Albina Engine & Machine Works, Inc., to the cross-claim of Luckenbach Steamship Company Inc., herein, admits, denies and alleges:

Article I.

For answer to Article I of the cross-claim, admits that cross-claimant Luckenbach Steamship Company, Inc., employed Albina Engine & Machine Works, Inc., to do certain repair work on a ladder in No. 5 hold of the S.S. Robert Luckenbach and that Albina Engine & Machine Works, Inc., undertook to perform said repair work on April 2, 1958, and that a fire occurred in No. 5 hold while said repair work was in progress and denies the remaining allegations thereof.

Article II.

For answer to Article II of the cross-claim, denies the same.

Article III.

For answer to Article III of the cross-claim, denies the same.

Further answering and for cause of suit against Luckenbach Steamship Company, Inc., Albina Engine & Machine Works, Inc., alleges as follows:

Article I.

On or about April 2, 1958, cross-respondent Luckenbach Steamship Company, Inc., engaged Albina Engine & Machine Works, Inc., to do certain repair work on a ladder in No. 5 hatch of the S.S. Robert Luckenbach while said vessel was berthed at Luckenbach Dock in the harbor at Portland, Oregon. The nature of the said repairs necessarily required that this cross-libelant perform welding on and about said ladder, as cross-respondent Luckenbach Steamship Company, Inc., fully realized and contemplated. Cross-libelant was instructed by cross-respondent to perform said work between the hours of 6:00 p.m. and 7:00 p.m. on April 2, 1958, and cross-respondent Luckenbach Steamship Company, Inc., undertook to have all cargo removed from the area of the ladder requiring repair work prior to the time when the welding was to be performed.

Cargo was removed from an area surrounding the ladder where welding was to be performed prior to about 6:00 p.m. on April 2, 1958, at which time the employees of cross-libelant came aboard the said vessel to perform said welding. Cross-libelant relied on cross-respondent's undertaking to remove cargo to the extent deemed by cross-respondent to be necessary. Cross-libelant took additional and proper precautions to avoid the starting or spreading of any fire in said vessel or cargo, and commenced to perform the necessary repairs on said ladder.

Despite such proper precautions taken by this cross-libelant and without any fault or neglect whatever by this cross-libelant, a fire broke out in said cargo; thereupon, cross-libelant's employees took immediate and proper steps in an attempt to put out the said fire before any significant damage occurred, and would have been able to do so were it not for the unseaworthiness of the S.S. Robert Luckenbach, her gear, tackle and appliances, and for the fault and neglect of the Luckenbach Steamship Company, Inc., its officers, agents, employees and other personnel as will hereinafter more fully appear. As the sole and proximate result of said unseaworthiness and fault of the cross-respondent Luckenbach Steamship Company, Inc., no water was available in the ship's fire lines; such unseaworthiness and neglect by cross-respondent directly and proximately caused the fire to spread, resulting in any damage or loss which libelants herein may have sustained.

Article II.

Cross-respondent Luckenbach Steamship Company, Inc., failed to make the S.S. Robert Luckenbach tight, staunch, strong, and ready for the performance of its services, and any loss or damage to the cargo of the libelants herein was caused by the negligence of Luckenbach Steamship Company, Inc., its agents, servants and employees in failing to provide a seaworthy vessel for the carriage of libelants' cargo, and other cargo aboard said vessel, to the knowledge and privity of Luckenbach Steamship Company, Inc., in the following particulars, among others:

1. Said vessel was generally unseaworthy.

2. Said vessel was manned by an insufficient number of officers and crew, several being unqualified as to rating, most being unacquainted with essential equipment aboard, and many being uninstructed as to their respective duties.

3. No alternative fire control system was established after a section of the main fire line was removed.

4. The ship's fire line was not connected to a readily accessible fire hydrant on the adjacent dock.

Article III.

Cross-respondent Luckenbach Steamship Company, Inc., through its officers, agents, employees and personnel, was guilty of negligence in the following particulars, among others:

1. It failed to establish an alternative water connection after a section of the main fire line had been removed.

2. It failed to report to all hands that the fire system was inoperative.

3. It failed to establish a connection to the ship's fire line from a nearby fire hydrant on the adjacent dock, although such connection could have been simply and conveniently made.

4. It failed to provide a suitable and operable fire hose, with nozzle attached, at the time and place where it knew welding was to be performed.

5. It failed to inform this cross-libelant's welding crew that the main fire line was inoperative.

Article IV.

The negligent acts and conduct of cross-respondent Luckenbach Steamship Company, Inc., and the unseaworthiness of the S.S. Robert Luckenbach, as aforesaid, were the sole and proximate cause of any damage to the cargo of libelants herein. However, if on the proofs as finally submitted the Court should be of the opinion that cross-libelant is in any way liable for all or any part of such damages as libelants herein may have sustained, then this respondent, as cross-libelant against Luckenbach Steamship Company, Inc., alleges that there would have been no damage to libelants' cargo, or to any cargo, except for the negligence of the cross-respondent Luckenbach Steamship Company, Inc., and the un-

seaworthiness of the vessel, as aforesaid. Cross-libelant therefore claims indemnity over or contribution from Luckenbach Steamship Company, Inc., or a division of damages, as the Court may deem to be warranted by the proofs.

Further answering and for second cause of suit against Luckenbach Steamship Company, Inc., Albina Engine & Machine Works, Inc., alleges as follows:

Article I.

Between April 4, 1958, and April 9, 1958, cross-libelant Albina Engine & Machine Works, Inc., did perform certain work and services and did furnish certain labor and materials for the repair of the S.S. Robert Luckenbach at the special instance and request of cross-respondent Luckenbach Steamship Company, Inc., for which said cross-respondent undertook and agreed to pay the sum of $28,933.89, the reasonable value thereof.

Article II.

No part of said sum of $28,933.89 has been paid, although cross-libelant has often requested and demanded payment.

Article III.

By virtue of the premises, cross-respondent Luckenbach Steamship Company, Inc., is presently indebted to cross-libelant Albina Engine & Machine Works, Inc., in the amount of $28,933.89.

All and singular, the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, respondent and cross-libelant Albina Engine & Machine Works, Inc., prays that Luckenbach Steamship Company, Inc., take nothing on its cross-claim, and that if any damages to libelants are awarded against this respondent and cross-libelant, then and in that event, this respondent and cross-libelant may recover over by way of indemnity or contribution from cross-respondent Luckenbach Steamship Company, Inc., and in any event that cross-libelant Albina Engine & Machine Works, Inc., recover from cross-respondent Luckenbach Steamship Company, Inc., the sum of $28,933.89 on its second cause of suit, together with its costs and disbursements, and for such other, further and different relief as to the Court may seem just and in accordance with the admiralty practice.

KRAUSE, LINDSAY,
NAHSTOLL & KENNEDY,

/s/ GUNTHER F. KRAUSE,
Proctors for Respondent and Cross-Libelant Albina Engine & Machine Works, Inc.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 9, 1959.

[Title of District Court and Cause.]

Civil No. 10002

AMENDED CROSS-CLAIM & CROSS-LIBEL OF LUCKENBACH STEAMSHIP COMPANY, INC., AGAINST ALBINA ENGINE & MACHINE WORKS, INC., AND ANSWER OF LUCKENBACH STEAMSHIP COMPANY, INC., TO CROSS-LIBEL OF ALBINA ENGINE & MACHINE WORKS, INC.

To the Honorable Judges of the Above-Entitled Court:

By way of amended cross-claim and cross-libel against Albina Engine & Machine Works, Inc., Luckenbach Steamship Company, Inc., alleges as follows:

Article I.

Cross-claimant and cross-libelant, Luckenbach Steamship Company, Inc., employed Albina Engine & Machine Works, Inc., as an independent contractor to do certain welding repairs on a ladder in No. 5 hold of the steamship Robert Luckenbach, and Albina Engine & Machine Works, Inc., undertook said work on April 2nd, 1958.

Cross-respondent Albina Engine & Machine Works, Inc., sent its welders aboard the said ship, and they entered the said No. 5 hold and began the said welding operations, with only 3 men and with-

out a fire watch, and without any water available in quantity to put out any fire or means of spraying water upon any fire that might break out, and without screening their welding operations from adjacent cargo, and without notifying any officers of the ship that they were about to conduct said welding operations. Fire broke out in the cargo of No. 5 hold as a result of the sparks from the welding, and the cargo was considerably damaged by burning and also by the water subsequently used to put it out, and cargo was also damaged in No. 4 hold by water directed into said hold to prevent the cargo therein from being ignited by the heat engendered in the bulkhead between No. 4 and No. 5 holds as a result of the fire in No. 5 hold.

Article II.

Cross-respondent Albina Engine & Machine Works, Inc., breached its contract to perform the said welding operations with reasonable safety, and was negligent in the following particulars, and the said breach and the said negligence were the sole and proximate cause of the damage which is the subject of this suit.

(1) It boarded the vessel and commenced said welding operations without any notice to any of the ship's officers that it was about to do so, and without ascertaining the condition of the fire control system on the ship.

(2) It performed the welding in No. 5 hold in the presence of hazardous articles, without any

water of any kind available except a small can containing perhaps 2 gallons, which was entirely inadequate to put out any fire, and without any other means of extinguishing a fire.

(3) It did not screen off the welding operations from adjacent cargo, or in any way isolate them from the cargo, and permitted and allowed welding sparks to ignite the cargo in said hold.

(4) It failed to properly supervise the welding operations.

(5) It failed to maintain a fire watch.

(6) It failed to have present during welding operations a competent attendant equipped with not less than one 4-pound CO2 fire extinguisher at hand and ready for instant use.

(7) It failed to have a suitable fire hose with nozzle attached, connected with a nearby fire hydrant, and to test the same before and during the welding operations and ready for instant use.

(8) In the aforesaid acts of neglect and breach of contract it violated §16-2527 of the Ordinances of the City of Portland.

Article III.

By reason of the aforesaid acts and conduct of Albina Engine & Machine Works, Inc., and in consequence of its breach of its contract, Luckenbach Steamship Company, Inc., has been damaged in

the sum of $41,172.71 with interest from April 2, 1958; and if it should be held liable in whole or in part for damage to cargo, as claimed by cargo claimants in this litigation, it will have been further damaged by the said breach of contract in the amounts which it may be compelled to pay on account of said cargo claims.

Answer to Cross-Libel of Albina Engine & Machine Works, Inc.

For answer to the cross-libel of Albina Engine & Machine Works, Inc., in which said cross-libelant claims $28,933.89 as due it for repairs to the S.S. Robert Luckenbach, Luckenbach Steamship Company, Inc., admits, denies and alleges as follows.

I.

For answer to Article I, denies the same.

II.

For answer to Article II, admits that the sum therein alleged has not been paid, although payment has been demanded.

III.

For answer to Article III, denies the same.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, Luckenbach Steamship Company, Inc., prays that libelants, Zellerbach Paper Com-

pany and Northwest Grocery Company take nothing, or that if any damages are awarded against it and in favor of libelants, then and in that event it may recover over by way of indemnity the amount of said damages from Albina Engine & Machine Works, Inc., and that in addition it may recover from Albina Engine & Machine Works, Inc., its own damages in the sum of $41,172.71, with interest from April 2, 1958, together with its costs and disbursements, and that Albina Engine & Machine Works, Inc., upon its cross-libel against Luckenbach Steamship Company, Inc., recover nothing, and that Luckenbach Steamship Company, Inc., may have its costs and disbursements and such other, further and different relief as to the Court may seem just and in accordance with the admiralty practice.

WOOD, MATTHIESSEN,
WOOD & TATUM,

/s/ ERSKINE WOOD,
Proctors for Luckenbach
Steamship Company, Inc.

Duly verified.

Service of copy acknowledged.

[Endorsed]: Filed July 21, 1959.

[Title of District Court and Cause.]

Civil No. 10,002

ANSWER OF ALBINA ENGINE & MACHINE WORKS, INC., TO AMENDED CROSS-CLAIM AND CROSS-LIBEL OF LUCKENBACH STEAMSHIP COMPANY, INC.

To: The Honorable Judges of the United States District Court for the District of Oregon, in Admiralty Sitting:

The answer of Albina Engine & Machine Works, Inc., to the amended cross-claim and cross-libel of Luckenbach Steamship Company, Inc., admits, denies and alleges:

Article I.

For answer to Article I of the amended cross-claim and cross-libel, admits that Luckenbach Steamship Company, Inc., employed Albina Engine & Machine Works, Inc., as an independent contractor to do certain welding repairs on a ladder in No. 5 hold of the S.S. Robert Luckenbach, and that Albina Engine & Machine Works, Inc., undertook said work on April 2, 1958; admits that cross-respondent Albina Engine & Machine Works, Inc., sent a three-man welding crew aboard the said ship and that they entered the No. 5 hold and began the said welding operations; admits that on April 2, 1958, a fire broke out in the cargo of No. 5 hold; admits that some cargo, the ownership of which is unknown to this cross-respondent, was

damaged by fire and by water, the extent of such damage being unknown to this cross-respondent;

Denies the remaining allegations of Article I of the amended cross-claim and cross-libel, and the whole thereof.

Article II.

For answer to Article II of the amended cross-claim and cross-libel, denies the same.

Article III.

For answer to Article III of the amended cross-claim and cross-libel, denies the same.

Wherefore, Albina Engine & Machine Works, Inc., prays that cross-claimant and cross-libelant Luckenbach Steamship Company, Inc., recover nothing upon its amended cross-claim and cross-libel against Albina Engine & Machine Works, Inc., and that Albina Engine & Machine Works, Inc., may have and recover its costs and disbursements herein, and such other, further and different relief as to the Court may seem just and in accordance with the admiralty practice.

KRAUSE, LINDSAY &
NAHSTOLL,

/s/ GUNTHER F. KRAUSE,

Proctors for Respondent Albina Engine & Machine Works, Inc.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 17, 1959.

In the United States District Court
for the District of Oregon

Civil No. 9997

HERSHEY CHOCOLATE CORPORATION, a Delaware Corporation,

Libelant,

vs.

The S.S. ROBERT LUCKENBACH, Her Engines, Tackle, Apparel and Furniture; LUCKENBACH STEAMSHIP COMPANY, INC., a Delaware Corporation, and ALBINA ENGINE & MACHINE WORKS, INC., an Oregon Corporation,

Respondents.

LUCKENBACH STEAMSHIP COMPANY, INC., a Corporation,

Cross-Claimant,

vs.

ALBINA ENGINE & MACHINE WORKS, INC., an Oregon Corporation,

Cross-Respondent.

LUCKENBACH STEAMSHIP COMPANY, INC., a Delaware Corporation,

Cross-Claimant and Cross-Respondent,

vs.

ALBINA ENGINE & MACHINE WORKS, INC., an Oregon Corporation,

Cross-Respondent and Cross-Libelant.

Civil No. 10,001

LONGVIEW FIBRE COMPANY, a Corporation, and WALTHAM BAG AND PAPER COMPANY, a Corporation,

Libelants,

vs.

The S.S. ROBERT LUCKENBACH, Her Engines, Tackle, Apparel and Furniture; LUCKENBACH STEAMSHIP COMPANY, INC., a Delaware Corporation, and ALBINA ENGINE & MACHINE WORKS, INC., an Oregon Corporation,

Respondents.

LUCKENBACH STEAMSHIP COMPANY, INC., a Corporation,

Cross-Claimant,

vs.

ALBINA ENGINE & MACHINE WORKS, INC., a Corporation,

Cross-Respondent.

LUCKENBACH STEAMSHIP COMPANY, INC., a Delaware Corporation,

Cross-Claimant and Cross-Respondent,

vs.

ALBINA ENGINE & MACHINE WORKS, INC., an Oregon Corporation,

Cross-Respondent and Cross-Libelant.

Civil No. 10,002

ZELLERBACH PAPER COMPANY, a California Corporation, and NORTHWEST GROCERY COMPANY, an Oregon Corporation,

Co-Libelants,

vs.

The S.S. ROBERT LUCKENBACH, Her Engines, Tackle, Apparel and Furniture; LUCKENBACH STEAMSHIP COMPANY, INC., a Delaware Corporation, and ALBINA ENGINE & MACHINE WORKS, INC., an Oregon Corporation,

Respondents.

LUCKENBACH STEAMSHIP COMPANY, INC., a Corporation,

Cross-Claimant,

vs.

ALBINA ENGINE & MACHINE WORKS, INC., an Oregon Corporation,

Cross-Respondent.

LUCKENBACH STEAMSHIP COMPANY, INC., a Delaware Corporation,

Cross-Claimant and Cross-Respondent,

vs.

ALBINA ENGINE & MACHINE WORKS, INC., an Oregon Corporation,

Cross-Respondent and Cross-Libelant.

Civil No. 328-59

PEYTON BAG COMPANY, a Corporation,

Libelant,

vs.

The S.S. ROBERT LUCKENBACH, Her Engines, Tackle, Apparel and Furniture; LUCKENBACH STEAMSHIP COMPANY, INC., a Delaware Corporation, and ALBINA ENGINE & MACHINE WORKS, INC., an Oregon Corporation,

Respondents.

ALBINA ENGINE & MACHINE WORKS, INC., an Oregon Corporation,

Respondent and Cross-Libelant,

vs.

LUCKENBACH STEAMSHIP COMPANY, INC., a Delaware Corporation,

Cross-Respondent.

Civil No. 335-59

W. E. FINZER & COMPANY, a Corporation,

Libelant,

vs.

ALBINA ENGINE & MACHINE WORKS, INC., a Corporation,

Respondent.

LUCKENBACH STEAMSHIP COMPANY, INC., a Corporation,

Third-Party Respondent.

Civil No. 336-59

HEARST PUBLISHING COMPANY, INC. (PEJEPSCOT PAPER DIVISION), a Corporation,

Libelant,

vs.

ALBINA ENGINE & MACHINE WORKS, INC., a Corporation,

Respondent.

LUCKENBACH STEAMSHIP COMPANY, INC., a Corporation,

Third-Party Respondent.

CONSOLIDATED PRETRIAL ORDER

To: The Honorable Gus J. Solomon, William G. East and John F. Kilkenny, Judges of the Above-Entitled Court:

The parties, with the approval of the court, agree to the following

Statement of Facts

I.

Libelants, Hershey Chocolate Corporation, Longview Fibre Company, Waltham Bag and Paper Company, Zellerbach Paper Company, Northwest Grocery Company, Peyton Bag Company, W. E. Finzer & Company, and Hearst Publishing Company, Inc. (Pejepscot Paper Division), were and

now are corporations and were the owners of certain goods, wares, and merchandise which had by them been delivered in apparent good order and condition to Luckenbach Steamship Company, Inc., a corporation (hereinafter referred to as "Luckenbach"), for delivery to Portland, Oregon, in consideration of agreed freight and in accordance with the terms and conditions of certain bills of lading.

II.

Said goods, wares and merchandises were loaded as cargo aboard the S.S. Robert Luckenbach, an ocean-going cargo vessel, registry No. 245923, owned and operated by Luckenbach, and while aboard said vessel in the city of Portland, Oregon, received damage by fire or water while said vessel was undergoing repairs performed and to be performed at said city by Albina Engine & Machine Works, Inc., a corporation (hereinafter referred to as "Albina").

III.

While said vessel was undergoing said repairs, a fire broke out aboard the vessel, which together with the water used to extinguish the same, caused the damage and loss of said cargo. At said time and place a section of the main fire line aboard the vessel had been removed. The fire aboard said vessel started as a result of sparks from welding by acetylene torch which was performed by employees of Albina, who were performing the repairs within the scope of their employment.

IV.

In the forenoon of April 2, 1958, the Chief Officer of the S.S. Robert Luckenbach reported to Luckenbach's port engineer, Mr. Sterling, that one of the lower rungs was missing from the iron ladder located in the after part of No. 5 hold, and Mr. Sterling engaged Albina to install a new rung. At that time the lower portion of the after ladder, No. 5 hold, was obscured by cargo consisting of metal conduit pipe stowed in the after part of No. 5 hold. The repair work to be done on the after ladder was a welding job and could not be done while longshoremen were working in the hold, as they were. Accordingly, it was mutually contemplated that the repair work would be performed some time between 6:00 and 7:00 p.m., the longshoremen's meal hour, by which time it was expected that discharge of the metal conduit pipe would have been completed.

The longshoremen ceased work for their meal hour at 6:00 p.m., and some time thereafter, Albina's three-man welding crew entered No. 5 hold of the ship to do the welding job. Said crew consisted of Smith, a boilermaker foreman, who was in charge; Larson, a welder; and Riley, a welder who was to act as fitter on this particular job.

The ladder in No. 5 hold requiring repair by replacement of a missing rung was not, in fact, the after ladder in that hold, as had been reported to Sterling, but in fact was the forward ladder in that hold. Sterling, having left the ship, did not

know this. Between the time when Sterling gave the order to repair the after ladder and the time the welders entered the hold, the cargo had been removed from around this ladder, and sufficiently removed from around the forward ladder, to expose both, so that it was evident to the welders which ladder needed repair. Accordingly, without further instructions, they proceeded to work on the forward ladder. Forward of this ladder, and extending clear across the width of the ship, was cargo consisting of several tiers of bales of burlap bags on the bottom, and cardboard cartons of construction paper on top. The distance between this cargo and the forward ladder, as stated by various witnesses, was from two to four feet. Mr. Smith placed two plywood "walk-boards," end to end, up against the cargo to serve as a screen or partition between it and the ladder. On the port side of the ladder he stood a carton or box next to and up against the plywood partition and extending aft from it, substantially at a right angle. In addition, he laid a one-inch board, athwartships, against and along the bottom of the plywood partition.

The place where the Albina men stood to perform the welding job on the forward ladder was clear of cargo. On the deck at this place was a "landing pad" which was a wooden floor covering the deck at this place used for landing cargo being loaded in the hold, thus protecting the deck from damage. Around the outside of this landing pad was a ramp which sloped slightly to the deck, the

slope of the forward edge of this ramp being toward the forward ladder.

The missing ladder rung was the second or third one up from the bottom. A temporary rung was in position there and was removed by Smith. The place where the new rung was to be welded in was between 4 and 5 feet above the landing pad (according to Smith).

In the No. 5 hold there was a can variously estimated to hold from three to five gallons containing drinking water for the longshoremen who had left it in the hold when they knocked off work. To what extent this can was filled with water is not agreed to by the parties. The welding crew brought no fire-fighting or fire extinguishing equipment of any kind on board the ship.

Albina's welder, Larson, struck an arc and began to burn off a small gob of metal where the old rung had been. Immediately, a spark or sparks or a piece of burning metal flew over the top of the partition and/or fell onto the forward ramp of the landing pad or upon the deck itself, rolled or bounced under or through the plywood partition, setting fire to the burlap bags.

Smith and his men pulled the plywood partition apart and tried to extinguish the fire with water from the above-mentioned can but were unsuccessful. Smith and Riley then came on deck to lower a ship's fire hose and to obtain water pressure; Lar-

son remained in the hold for a time to handle the hose.

Meanwhile, the city fire department had already been called. The city firemen extinguished the fire with water from their own hoses. According to the fire department's records, the call was received at 6:20 p.m. The time interval between the calling of the fire department and the arrival of the fire department personnel on the scene has been stated by various witnesses to have been from three or four minutes up to fifteen minutes. The firemen had water in No. 5 hold within four minutes after their arrival.

The fire in No. 5 hold so heated the bulkhead between No. 5 and No. 4 holds that there was a danger of fire occurring in No. 4 hold also. Therefore, the fire department poured water into No. 4 hold, damaging cargo stowed there.

Some of the ship's plates and the bulkhead between No. 4 and No. 5 holds were buckled and damaged by the fire, and the ship sustained other damage therefrom, all of which Albina repaired at a stated cost of $28,933.89.

V.

At all times there were in full force and effect the following regulations:

> Coast Guard, Department of the Treasury, Part 126, "Handling of Explosives or other Dangerous Cargoes within or Contiguous to Waterfront Facilities";

Code of Federal Regulations, Title 33, Section 126.15, Volume 22, Federal Registry No. 246, published December 20, 1957;

Code of Federal Regulations, Title 46, Part 146 to Part 149, revised as of January 1, 1958, Section 146.27-100, pages 582 and 602;

City Ordinance of the City of Portland, Section 16-2527, passed by the City Council of the City of Portland;

Code of Federal Regulations, Title 46, Section 142.02-20.

VI.

The parties stipulate that the testimony given before the United States Coast Guard Investigating Unit may, subject to objection as to materiality, relevancy and competency, be offered by any party and received into evidence.

VII.

The parties expressly stipulate that the foregoing statements of fact may be supplemented by additional testimony on behalf of any party to this proceeding.

Libelants' Contentions

I.

Libelants contend that the aforementioned loss and damage occurred proximately as the result of the many faults and neglects of Albina and Luckenbach, and each of them, concurring and combining.

II.

Luckenbach failed to make said vessel tight, staunch, strong and ready for the performance of its services as contemplated, and the loss and damage to said cargo was caused by the negligence of Luckenbach, its agents, servants and employees, in failing to provide a seaworthy vessel for carriage of said cargo to the knowledge and privity of Luckenbach, in the following particulars, among others:

1. Said vessel was generally unseaworthy.

2. Said vessel was manned by an insufficient number of officers and crew, several being unqualified as to rating, most being unacquainted with essential equipment aboard, many being uninstructed as to their respective duties.

3. A section of the main fire line had been removed and not replaced, nor was any alternative fire control system established.

4. The fire control system was inoperative.

III.

Luckenbach, through its servants, agents, employees and personnel, both officers and men, was guilty of negligence in the following particulars, among others:

1. It removed a section of the main fire line.

2. It failed to establish an alternative water connection after the fire main had been removed.

3. It failed to report to all hands that the fire control system was inoperative.

4. It permitted welding aboard said vessel, knowing that the fire system was inoperative.

5. It failed to establish a shoreside connection to the fire control system.

6. It permitted and allowed welding to be performed aboard the vessel, particularly in Hold No. 5, when the same was loaded with hazardous articles.

7. It permitted and allowed welding to be performed aboard the vessel when the same was improperly supervised.

8. It permitted and allowed welding to be performed aboard the vessel when there was no suitable fire hose with nozzle attached connected to a nearby fire hydrant

9. It permitted and allowed welding to be performed aboard the vessel without there being then and there present a competent attendant equipped with not less than one four-pound CO2 fire extinguisher at hand and ready for instant use.

10. It failed to station a fire watch at the site of the welding operation.

11. It performed welding aboard the S. S. Robert Luckenbach in the hold of said vessel containing cargo classified as dangerous.

12. It performed repairs and work in or upon boundaries of holds without having ascertained and required that all precautions were taken to see that no residual of cargo was left in said hold sufficient to create a hazard.

13. It performed repairs aboard the vessel under the circumstances above set forth when the same were not necessary for the safety of the vessel, its passengers or crew, and when said repairs were not of an emergency nature.

IV.

Albina was guilty of fault and negligence in the following particulars, among others:

1. It performed welding aboard the vessel without having first ascertained whether the vessel was equipped with a fire control system in good operating order.

2. It performed welding aboard the vessel, and particularly in Hold No. 5, in the presence of hazardous articles, without a suitable fire hose with nozzle attached connected to a nearby fire hydrant.

3. It permitted and allowed welding sparks to ignite the cargo in said hold.

4. It failed to properly supervise the welding operations.

5. It failed to maintain a fire watch.

6. It failed to have present during welding operations under such circumstances then and there attendant, a competent attendant equipped with not less than one four-pound CO2 fire extinguisher at hand and ready for instant use.

7. It failed to properly screen the welding operations.

8. It performed welding aboard the S. S. Robert Luckenbach in the hold of said vessel containing cargo classified as dangerous.

9. It performed repairs and work in or upon boundaries of holds without having ascertained and required that all precautions were taken to see that no residual of cargo was left in said hold sufficient to create a hazard.

10. It performed repairs aboard the vessel under the circumstances above set forth when the same were not necessary for the safety of the vessel, its passengers or crew, and when said repairs were not of an emergency nature.

V.

The unseaworthiness of the vessel, the faults and negligence, both personal and otherwise, of her owner, and the faults and negligence of Albina, concurring together and acting in concert, constituted the sole, proximate, contributing and concurring causes of the fire and the loss and damage to said cargo in the foregoing particulars.

VI.

Libelants contend, on information and belief, that efforts to extinguish the fire aboard the S. S. Robert Luckenbach caused additional damage to the vessel and to her cargo on board, and that Luckenbach, as owner and operator of the vessel, incurred expenses in its effort to extinguish the fire and to prevent the total loss of the vessel and her cargo.

VII.

Luckenbach, as owner, and its general average adjuster, if any, may seek general average contributions, salvage and special charged from libelants' shipments on account of loss, damage and expense suffered and incurred in fighting said fire, and the libelants may be obligated to pay general average, salvage and special charges for which their shipments may be legally liable. Libelants, however, do not concede at this time liability for general average contributions, but are not advised whether or not general average will be sought.

VIII.

By reason of the many faults and negligence of Albina proximately causing said fire and said loss and damage and expense, Albina should be required to indemnify and save libelants harmless from any claimed general average contribution, salvage and special charges which may be asserted against them by reason of the premises.

Libelants' contentions are denied by Luckenbach, with the exception of the libelants' charges of fault and negligence against Albina, which contentions Luckenbach admits, except Item 10 of paragraph IV.

Libelants' contentions are denied by Albina, with the exception of the libelants' charges of fault and negligence against Luckenbach, which contentions Albina admits.

Contentions of Luckenbach Steamship Company, Inc., Against Libelants

I.

Luckenbach contends that it did not breach its contract of carriage in any way, and relies in full upon all defenses in its bills of lading.

II.

Luckenbach contends that the fire and consequent damage were not caused by any fault or negligence on its part, but were caused solely by the fault and negligence of Albina.

III.

Luckenbach contends that the fire was caused without any design or neglect of Luckenbach, and Luckenbach claims the benefit of §4282 of the Revised Statutes; §182, Title 46 U.S.C. (the fire statute); and Clause 13 of the bills of lading embodying said statute.

IV.

Luckenbach contends that it is absolved from any liability for the fire by Clause 17 of the bills of lading, to the effect that it shall not be liable for any loss, damage or delay arising from "fire from any cause on land or on water, whether on board ship, on cars, lighters, in warehouse or on wharves or elsewhere; water or steam or chemicals used for the purpose of extinguishing fire."

V.

Luckenbach contends that in the event of any liability being found against it, any resulting dam-

ages are restricted by Clause 18 of the bills of lading, limiting the value of the goods to $500 per piece or package, and in no case more than invoice value of the goods at point of shipment; and in case of shipments moving under released rates as provided in the tariff, liability shall not exceed the provision of such released rates, and that the shipper was given the choice of rates as provided in said Clause 18, and did not declare any different valuation as provided in said clause.

VI.

That notwithstanding the removal of the section of the main fire line in the engine room, there were other alternate pipelines of the fire system still usable.

VII.

That it entrusted the welding operations to Albina, an experienced ship repair contractor, expert in welding, and Albina had a duty not to proceed with the work unless and until it was reasonably safe to do so and to perform the work in a reasonably skillful, efficient and safe manner; that Luckenbach had a right to rely, and did rely upon Albina's performing its said duties; and that the proximate cause of the fire and damage to cargo was Albina's breach of its said duties.

Libelants deny the foregoing contentions of Luckenbach.

Contentions of Luckenbach Steamship Company, Inc., Against Albina Engine & Machine Works, Inc.

I.

Luckenbach contends that the sole proximate cause of the fire was the fault and neglect of Albina.

II.

Luckenbach contends that Albina breached its contract to perform the welding operations with the reasonable skill and safety of an expert.

III.

Luckenbach contends that Albina was guilty of a breach of its contract in proceeding with the welding at all with hazardous cargo near the forward ladder.

IV.

Luckenbach contends that Albina, without limitation of the foregoing, breached the contract in the following particulars:

(a) It boarded the vessel and commenced said welding operations without any notice to any of the ship's officers that it was about to do so, and without ascertaining the condition of the fire control system on the ship.

(b) It performed the welding in No. 5 hold in the presence of hazardous articles, without any water of any kind available, except a small can containing perhaps 2 gallons, which was entirely inadequate to put out any fire, and without any other means of extinguishing a fire.

(c) It did not adequately screen off the welding operations from adjacent cargo, or in any way adequately isolate them from the cargo, and permitted and allowed welding sparks to ignite the cargo in said hold.

(d) It failed to properly supervise the welding operations.

(e) It failed to maintain a fire watch.

(f) It failed to have present during welding operations a competent attendant equipped with not less than one four-pound CO2 fire extinguisher at hand and ready for instant use.

(g) It failed to have a suitable fire hose with nozzle attached, connected with a nearby fire hydrant, and to test the same before and during the welding operations and ready for instant use.

(h) In the aforesaid acts of neglect and breach of contract it violated §16-2527 of the Ordinances of the City of Portland.

V.

Luckenbach contends that Albina repaired the damage to the ship caused by the fire voluntarily and without any order to do so, and at its own cost and expense, and that its conduct in that regard is an admission of its liability for that and all other damage caused by the fire.

VI.

Luckenbach contends that as a result of the fire it has suffered loss, damage and expense, and has

been damaged, in the sum of $41,172.71, and that it should have a decree against Albina awarding to Luckenbach said damages, with interest from the date of the fire; and contends further that if it should be compelled to pay the libelants any damages, Luckenbach should recover over against Albina as indemnity the amount so paid, or, at the least, should have contribution; and that Albina should not recover anything upon its claim and cross-libel, in which it seeks to recover $28,933.89, the cost of the repairs which it made upon the S. S. Robert Luckenbach, and that Luckenbach should have such other, further and different relief as the proofs may warrant and the court may deem just.

The foregoing contentions of Luckenbach are denied by Albina.

Contentions of Albina Engine & Machine Works, Inc.

I.

Luckenbach failed to make the S. S. Robert Luckenbach tight, staunch, strong and ready for the performance of its intended services in the following particulars, among others:

1. Said vessel was generally unseaworthy.

2. Said vessel was manned by an insufficient number of officers and crew, several being unqualified as to rating, most being unacquainted with

essential equipment aboard, and many being uninstructed as to their respective duties.

3. No alternative fire control system was established after a section of the main fire line was removed.

4. The ship's fire line was not connected to a readily accessible fire hydrant on the adjacent dock.

II.

Luckenbach, through its officers, agents, employees and personnel, was guilty of negligence in the following particulars, among others:

1. It failed to establish an alternative water connection after a section of the main fire line had been removed.

2. It failed to report to all hands that the fire system was inoperative.

3. It failed to establish a connection to the ship's fire line from a nearby fire hydrant on the adjacent dock, although such connection could have been simply and conveniently made.

4. It failed to provide a suitable and operable fire hose with nozzle attached at the time and place where it knew welding was to be performed.

5. It failed to provide members of the crew, properly instructed, to stand by the fire control equipment at the time and place where it knew welding was to be performed.

6. It failed to inform Albina's welding crew, or anyone connected with Albina that the main fire line was inoperative and that no alternative water connection had been made.

7. It failed to notify the Coast Guard as required by U. S. Coast Guard regulations that welding was to be performed in No. 5 hold.

8. It failed to take any or all of the precautions required by U. S. Coast Guard regulations under the circumstances existing prior to and at the time of the fire.

III.

The unseaworthiness of the vessel, the faults and negligence, both personal and otherwise, of Luckenbach, constituted the sole proximate causes of the fire and the loss and damage to the cargo.

IV.

Albina contends that it made repairs to the S. S. Robert Luckenbach following the fire at the special instance and request of Luckenbach; that the reasonable value of such repairs is $28,933.89, which Luckenbach undertook and agreed to pay; that no part of said sum has been paid although demand for payment has been made and that by reason thereof Luckenbach is presently indebted to Albina in the sum of $28,933.89.

V.

Albina contends that any issue as to Albina's liability to indemnify libelants for some indefinite general average contribution, salvage or special

charges which libelants may or may not be called upon to pay, and which libelants may or may not be under a duty to pay, is remote, speculative, contingent and not presently within the jurisdiction of this honorable Court, but, in the event the Court should determine that such issue is within its jurisdiction and that such issue should be resolved herein, Albina expressly denies that it is under any such liability to so indemnify and hold libelants harmless.

The foregoing contentions of Albina are denied by Luckenbach.

Physical Exhibits

Certain physical exhibits have been identified and received as pretrial exhibits, the parties agreeing, with the approval of the Court, that no further identification of exhibits is necessary. In the event that said exhibits, or any thereof, should be offered in evidence at the time of trial, said exhibits are to be subject to objection only on the grounds of relevancy, competency and materiality.

Libelants' Exhibits

1. Transcript of testimony, Merchant Marine Investigating Section.
2. File of City Fire Marshal.
3. Copy of 46 CFR 142.20-02.
4. Certified copy of Police Code, City of Portland, Ordinance No. 16-2527.
5. Reprint Federal Registry No. 246, Dec. 20, 1957.

6. A-F Bills of lading covering shipments for which recovery is sought.

7. Sealed exhibit for impeachment purposes only.

Exhibits of Luckenbach Steamship Company, Inc.

21. The bills of lading for the carriage of the goods.

22. Statement of Luckenbach's expenses and damages, with supporting bills attached.

(Note: Luckenbach's statement of damages is omitted at this time since that question is reserved.)

23. Coast Guard testimony.

24. Diagram or blueprint of No. 5 hold.

26. Water can.

25. A-B Photo, Number 5 hole.

Exhibits of Albina Engine & Machine Works, Inc.

41. Copy of 46 CFR, Section 95.01-1.

42. Copy of 46 CFR, Section 146.27-1.

43. Abstract from 46 CFR.

44. Survey Report on Ship Damages.

45. Survey Report on Cargo Damages.

It is expressly agreed between the parties that the issue of damages shall be reserved for subsequent determination by this court in the event the parties are unable to agree upon the amount of damages sustained by the libelants.

The parties hereto agree to the foregoing pretrial order, and the court being fully advised in the premises,

Now Orders that upon trial of this cause no proof shall be required as to matters of fact hereinabove specifically found to be admitted, but that proof upon the issues of fact and law between libelants and Luckenbach Steamship Company, Inc., and Albina Engine & Machine Works, Inc., as hereinabove stated shall be had, and it is further

Ordered that this pretrial order does not supersede the pleadings, and that in accordance with the long established practice in admiralty, both this order and the pleadings may be freely amended at any time to promote justice in the correct determination of these causes.

Dated at Portland, Oregon, this 6th day of January, 1960.

/s/ JOHN F. KILKENNY,
United States District Judge.

Approved:

/s/ JOHN GORDON GEARIN,
Of Proctors for Libelants.

/s/ ERSKINE WOOD,
Of Proctors for Luckenbach Steamship Company, Inc.

/s/ ALAN H. JOHANSEN,
Of Proctors for Albina Engine & Machine Works, Inc.

Lodged December 3, 1959.

[Endorsed]: Filed January 6, 1960.

[Title of District Court and Cause.]

In Admiralty

Civil Nos. 9997, 10001, 10002, 328-59, 335-59, 336-59

AMENDMENTS TO PRETRIAL ORDER

Additional Charge of Negligence
Against Luckenbach

"14. It failed to promptly notify the Portland Fire Department."

Additional Charge of Negligence
Against Albina

"11. It failed to promptly notify the Portland Fire Department."

Dated this 7th day of January, 1960.

/s/ JOHN F. KILKENNY,
United States District Judge.

[Endorsed]: Filed January 7, 1960.

[Title of District Court and Cause.]

Civil Nos. 9997, 10001, 10002, 328-59, 335-59, 336-59

OPINION

Kilkenny, Judge:

Libelants were the owners of certain goods, wares and merchandise which had been delivered by them

in good condition to Luckenbach Steamship Company, Inc., a corporation, (herein called "Luckenbach"), for delivery to Portland, Oregon, in consideration of agreed freight and in accordance with the terms and conditions of certain bills of lading. Said property was loaded as cargo aboard the S. S. Robert Luckenbach, an ocean-going cargo vessel owned and operated by Luckenbach, and while aboard said vessel in Portland, Oregon, received damage by fire or water while said vessel was undergoing repairs performed and to be performed at said city by respondent, Albina Engine & Machine Works, Inc., a corporation, (herein called "Albina"). While said vessel was undergoing said repairs, a fire broke out aboard the vessel, which, together with the water used to extinguish the same, caused the damage and loss of said cargo. At said time and place a section of the main fire line aboard the vessel had been removed. The fire aboard the vessel started as a result of sparks from welding by acetylene torch, which was performed by employees of Albina, who were performing the repairs within the scope of their employment.

1. Libelants claim cargo damage against both Albina and Luckenbach, charging Luckenbach with failure to provide a seaworthy vessel and with negligence, and charging Albina with negligence.

2. Luckenbach charges Albina with negligence and claims the benefit of what is commonly known as "The Fire Statute," Title 46, U.S.C.A. §182, and Clause 13 of the bills of lading of libelants, embody-

ing such statute. Luckenbach claims indemnity against Albina for any amount that it might have to pay libelants, or contribution to that amount, and is claiming damage against Albina for loss, damage and expense occasioned by the fire.

3. Albina is claiming indemnity or contribution against Luckenbach for any amounts it may have to pay libelants and is also charging Luckenbach with its bill for repairing the fire damage to the ship.

In the forenoon of April 2, 1958, the Chief Officer of the S. S. Robert Luckenbach reported to Luckenbach's Port Engineer, Mr. Sterling, that one of the lower rungs was missing from the iron ladder located in the after part of No. 5 hold, and he engaged Albina to install a new rung. At that time the lower portion of the after ladder, No. 5 hold, was obscured by cargo consisting of metal conduit pipe stowed in the after part of No. 5 hold. The repair work to be done on the after ladder was a welding job and could not be done while longshoremen were working in the hold. The longshoremen ceased work for their meal hour at 6:00 p.m. and some time thereafter, Albina's three-man welding crew entered No. 5 hold of the ship to do the welding job. Said crew consisted of Smith, a boilermaker foreman who was in charge, and two welders. The ladder in No. 5 hold requiring repair by replacement of a missing rung was not, in fact, the after ladder in that hold, as had been reported to Sterling, but in fact was the forward ladder in that hold. Sterling, having left the

ship, did not know this. Between the time Sterling gave the order to repair the after ladder and the time the welders entered the hold, the cargo had been removed from around this ladder and around the forward ladder, sufficiently exposing both so that it was evident to the welders which ladder needed repair. Without further instructions, they proceeded to work on the forward ladder. Forward of this ladder and extending clear across the width of the ship was cargo consisting of several tiers of bales of burlap bags on the bottom and cardboard cartons of construction paper on top. The distance between this cargo and the forward ladder was from two to four feet. Smith placed two plywood "walk-boards" end to end up against the cargo to serve as a screen or partition between it and the ladder. On the port side of the ladder he stood a carton or box next to and up against the plywood partition and extending aft from it, substantially at a right angle. In addition, he laid a one-inch board athwartships against and along the bottom of the plywood partition. The place where Albina's men stood to perform the welding job on the forward ladder was clear of cargo. On the deck at this place was a "landing pad" which was a wooden floor covering the deck at this place used for landing cargo being loaded into the hold, thus protecting the deck from damage. Around the outside of this landing pad was a ramp which sloped slightly to the deck, the slope of the forward edge of this ramp being toward the forward ladder. The missing ladder rung was the second or third one up from the bottom. A temporary rung

was in position there and was removed by Smith. In the No. 5 hold there was a can, variously estimated to hold from three to five gallons, containing drinking water for the longshoremen, who had left it in the hold when they quit work. The can contained little water. The welding crew brought no fire-fighting or fire extinguishing equipment of any kind on board the ship. Albina's welder, Larson, struck an arc and began to burn off a small gob of metal where the old rung had been. Immediately, a spark or sparks or a piece of burning metal flew over the top of the partition and/or fell onto the forward ramp of the landing pad or upon the deck itself, rolled or bounced under or through the plywood partition, setting fire to the highly inflammable burlap bags.

Sterling, Luckenbach's Port Engineer, was the man in charge of repairs for respondents. The aft ladder which he ordered repaired was located approximately 40 feet from the forward ladder, which was being repaired when the fire occurred. Sterling had ordered the cargo removed from around the aft ladder. He had left the ship about 3:00 p.m. and did not return until after the fire had caused the damage.

Prior to the events in question, Albina, on orders from Sterling, had removed a section of the main line pipe, which supplied water to the ship's hydrants on deck. The pipe was removed for the purpose of repair. To make up this deficiency the

Chief Engineer of the vessel was ordered to connect the ship's water system with a Portland city water hydrant on the adjacent dock. An assistant engineer was instructed to perform this task, but neglected to do so. At the time of the fire, water was not available on the deck to be used in extinguishing the fire. The fire department was on the scene within a short period of time, from 3 to 15 minutes, and had water in the hold within 4 minutes after arrival. The fire in No. 5 hold so heated the bulkhead between the No. 4 and the No. 5 holds that there was danger of fire occurring in the No. 4 hold and the fire department poured water into that hold also, thus damaging additional cargo. Some of the ship's plates and the bulkhead between the No. 4 and the No. 5 holds were buckled and the ship sustained other damage, at least some of which was repaired by Albina. Sterling did not know of the failure to connect the city fire hydrant to the ship, nor that any welding was to be done on the forward ladder in No. 5 hold.

It is clear that Albina, in using the torch for the cutting and welding of metal in the presence of highly inflammable burlap bags, was undertaking an extremely dangerous operation. Even if Albina, by deliberate design, had attempted to create a hazardous fire condition, it could have made no improvement. The use of an acetylene torch, with its attendant heat and great danger, under these conditions, was nothing less than wanton conduct. No doubt, it created a situation where the rule of abso-

lute liability should apply. Restatement of the Law, Torts, Absolute Liability, chap. 21.

However, I am not compelled to decide whether that doctrine is applicable to the facts in this case. The overwhelming weight of the evidence supports the libelants and Luckenbach's contentions that Albina was guilty of negligent conduct in using the acetylene torch under the conditions and circumstances then and there existing. The degree of care required in any given situation is that commensurate with the danger involved. Grand Trunk Railway Co. v. Richardson, 91 U.S. 454; Leach v. St. Louis-San Francisco Ry. Co., 48 F. 2d 722; Brown v. Standard Oil Co. of New York, 247 F. 303.

The only case cited by Albina in support of its contention that it was not negligent is Rockwood & Co. v. American President Lines (D.C.N.J. 1946) 68 F. Supp. 224. In the Rockwood case the fire was not discovered until 4½ hours after the acetylene burning operation was completed. The operators of the acetylene torch had with them a pail of water and a fire extinguisher, in addition to the asbestos sheeting which they used in building the protection wall. There was nothing in the case which would show that any spark or sparks entered the trunk in which the fire occurred. This case is not in point.

Although there is abundant evidence of lack of due care in other particulars as specified by libelants against Albina, said respondent contends that Code of Federal Regulations, Title 46, §142.02-20, a Coast

Guard regulation prohibiting repairs being undertaken in holds containing dangerous articles where such repairs involve welding or burning, is not applicable. Albina takes the position that this regulation applies only to a vessel and not to an independent contractor working with such equipment aboard the vessel. I think otherwise.

Likewise, Albina contends that §16-2527 of the Police Code of the City of Portland requiring a suitable fire hose with nozzle attached, connected with a fire hydrant and a test made before burning or welding takes place on any vessel in the Port of Portland is unconstitutional, in that the field is preempted by Federal statutes and the Coast Guard regulations. I find no conflict between the regulations and the ordinance. The regulation, 46 CFR 146.01-12, specifically recognizes the right of local authorities to adopt regulations not inconsistent with those of the Coast Guard. Albina was negligent and caused the fire under specifications numbered 1, 2, 3, 4, 5, 6, 7 and 8.

Generally speaking, libelants urge that Luckenbach is liable on three general theories: (1) that it did not act as a reasonable, prudent person should have acted after it had knowledge of the fire; (2) that it acted in violation of said Code of Federal Regulations and said ordinance; and (3) that it did not remove the highly inflammable cargo from around the forward ladder. In this connection we must keep in mind that Sterling ordered the repair to the ladder located in the after section of No. 5

hold and that the repair was undertaken at the forward ladder of No. 5 hold, around which was stowed some highly inflammable material and which was some 40 feet distant from the aft ladder.

Luckenbach contends that even though the statute and the ordinance might have been violated, there was no evidence that the managing officers or agents of the vessel were guilty of "personal negligence" and that the vessel is excused by reason of the provisions of the fire statute, Title 46, U.S.C.A. §182 and Clause 13 of the bills of lading of each of the libelants, which incorporates the fire statute. The fire statute reads as follows:

"No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

Libelants claim that the fire statute does not apply under the facts of this case and that the negligence of Luckenbach in failing to provide water, in ordering the repairs in the hold where inflammable material was present, and in failing to remove the inflammable material was a contributory cause of the fire. The evidence is undisputed that Sterling, the engineer in charge of repairs, ordered the repairs at one place and without further instructions Albina made the repairs at another, where a great fire

hazard existed. No such hazard existed at the place where the repairs were ordered. The evidence is undisputed that Sterling ordered the water lines connected with the hydrant on the dock. Failure to carry out this order was due to the negligence of one of the subordinates on the vessel. Radovich, the Marine Superintendent, did not arrive on the vessel until 6:10 p.m. At that time, he did not know that the repairs were being made on a ladder other than pursuant to the original instructions. It was only after he saw the blaze in the hold that he recognized that repairs were being made on the other ladder. He immediately did everything within his power to control the fire. So, even though Radovich could be viewed as a managing officer or agent in charge of the vessel, the fire had been "caused" when he first noticed it. Under the evidence in the case I am of the opinion that Radovich was a subordinate and that his duties were very limited. The evidence is undisputed that he had nothing whatsoever to do with the repair of the ship. Here, the owner was repairing the system and, through its managing officer, had given specific orders to have equipment substituted and in place and ready to control a fire. Before the owner is liable under the fire statute, the fire must be caused "by the design or neglect of the owner." The word "design" contemplates a causitive act or omission, done or suffered wilfully or knowingly by the shipowner. The Strathdon, 89 F. 374, 378. Of course, there is no evidence of the fire in this case being caused wilfully or knowingly by

the shipowner or any of its officers or employees. The fire was caused by Albina.

The "neglect of the owner" mentioned in the statute means the owner's personal negligence, or in case of a corporate owner, negligence of its managing officers and agents as distinguished from that of the master or subordinates. Consumers Import v. Kabushiki Kaisha, 320 U.S. 249, 252. It is well settled that a shipowner is not liable for damages resulting from fire unless the libelant proves that the cause of the fire was due to "design or neglect" of the owner and the burden is on the libelant to prove that the neglect of the owner did cause the fire. The Strathdon, supra; Fidelity-Phenix Fire Insurance Co. v. Flota Mercante Del Estado, 5 Cir. 1953, 205 F. 2d 886, 887. Upon showing that the cargo was damaged or destroyed by fire, Luckenbach brought itself within the exemption provided by the fire statute, unless the libelants go forward and show that the fire was caused by Luckenbach's personal neglect. Hoskyn & Co. v. Silver Line, 2 Cir., 1944, 143 F. 2d 462, 463; The Cabo Hatteras, 5 F. Supp. 725, 728. Unseaworthiness does not prevent the application of the fire statute. Earle & Stoddart, Inc., v. Ellerman's Wilson Line, Ltd., 287 U.S. 420; Hoskyn & Co. v. Silver Line, supra. Neither is the benefit of the fire statute conditioned upon compliance with the safety act. 46 U.S.C.A. §463; Fidelity-Phenix Fire Insurance Co. v. Flota Mercante Del Estado, supra; Automobile Insurance Co. v. United Fruit Co., 2 Cir., 1955, 224 F. 2d 72, 75.

Libelants claim that the statutory fault doctrine established by The Pennsylvania, 19 Wall. 125, 86 U.S. 125, applies to proof of the cause of a fire resulting in cargo damage. The Courts have held otherwise. Automobile Insurance Co. v. United Fruit Co., supra. Some cases would indicate a contrary conclusion. However, the statement on the subject in such case is not supported by the authorities cited. For example, Verbeeck v. Black Diamond Steamship Corp., 2 Cir., 1959, 269 F. 2d 68, 71.

It is contended that Judge Fee's decision in American Mail Line, Ltd. v. Tokyo Marine & Fire Insurance Co., Ltd., 9 Cir., 1959, 270 F. 2d 499, casts liability on Luckenbach. There is no similarity in the facts of these cases. In the American Mail case, the captain of the vessel knew of the fire in the hold on August 20th. He continued to load cargo on that day, the 21st and the 22nd of August and on the 24th of August commenced the use of a smothering agent to control the fire, which had then been burning for four days. During all of that time the managing officers of the corporation knew of the existence of the fire. Judge Fee upheld the finding of the trial court that the owner failed to use reasonable precaution or to take measures which a reasonably prudent person would have taken to control the fire after it knew of its existence. Judge Fee held that the fire statute had no application for the reason that liability was being fixed by reason of the failure of the owner to control the fire. Here, immediate action was taken to control the fire. In

this case, there is no evidence that anyone failed to use reasonable diligence after the start of the fire.

I am convinced that the fire statute is applicable and that Luckenbach and its superior officers were guilty of no negligence which caused the fire. Without question, the fire was caused by Albina. No one in charge for Luckenbach, nor any of its superior officers, had anything to do with the welding operation on the forward ladder. Albina claims that Radovich was a superior officer and one whose negligence would bind the ship. Nowhere does Radovich testify that he had any power or authority with reference to the repairing of the ship. In the direct question which was propounded to him, (Ex. 23, p. 101), he testified as follows:

> "Q. Do you have any association with repairs to be effected by contractors or otherwise?
> "A. No."

He testified that he arrived on the ship on the evening in question at about 5 or 10 minutes after 6:00 p.m. and that he went aboard for the purpose of observing the loading and unloading of the cargo. He had been directed to have some of the deep tanks in 'tween deck No. 2 hatch discharged of cargo and cleaned relative to some ship repair work to be done. He was to have this work done by 8:30 a.m. in the morning. He didn't know whether any welding repair work was required on that repair job. (Ex. 23, p. 103). He had nothing whatsoever to do with the repair of the ship or with the removal of any cargo from around the ladder.

We now approach the question of Albina's liability to Luckenbach for the damage to the vessel caused by the fire. At the same time, we should consider the claim of Albina against Luckenbach for the reasonable value of the repairs which Albina made to the vessel after the fire. The "fire statute" which relieved Luckenbach from liability to libelants is of no help to Luckenbach on this problem. However, Albina impliedly contracted to do the repair job in a skillful, safe and workmanlike manner. In such case there is liability on the independent contractor to the owner of the vessel. Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc., 355 U.S. 563; Crumady v. The Joachim Hendrick Fisser, 358 U.S. 423; Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corporation, 350 U.S. 124. Where a shipowner and an independent contractor enter into a service agreement, the former is entitled to indemnification for all damages sustained as a result of the independent contractor's breach of its warranty of workmanlike service. Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corporation, supra; Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc., supra. The right to indemnity exists even though the vessel was unseaworthy at the time. Where the negligence of the independent contractor brings the unseaworthiness of the ship into play, such action on the part of the independent contractor amounts to a breach of workmanlike service and since that warranty was for the benefit of the vessel, the vessel is entitled to indemnity from the contractor. Crumady v. The Joachim Hendrick Fisser, supra.

Albina argues that these cases should be distinguished in that they involve personal injuries to a stevedore, rather than property damage to a vessel. I am unable to distinguish the logic or the soundness of the reasoning in the stevedoring cases from what should be the logic and the soundness of the reasoning in arriving at a proper conclusion in this case. The decisions in the stevedore cases control. I see no distinction between liability by way of indemnity and lability by way of direct damage or compensation.

Other legal questions raised by the briefs, with the possible exception of General Average, would seem to be academic.

Libelants are entitled to a decree against Albina for damage to cargo. Luckenbach is entitled to a decree against Albina for damage to the vessel. Albina is not entitled to a decree against Luckenbach for indemnity or for the value of services rendered in repair of the ship, other than those services performed and material furnished, if any, to Luckenbach for repair work independent of the fire in question.

Proctors may draft a supplemental pretrial order outlining the issues on the question of damages. The question of offset in favor of Albina, on its repair bill against Luckenbach, shall be included in such supplemental order. Appropriate findings may be presented by proctors for Luckenbach and libelants after a decision on damages.

Dated March 10, 1960.

[Endorsed]: Filed March 10, 1960.

[Title of District Court and Cause.]

Civil No. 9997 and Consolidated Cases

(Civil Nos. 10,001, 10,002, 328-59, 335-59, 336-59)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings

I.

All the above cases were, by consent of the parties, consolidated for trial and decree.

II.

The Court adopts its Opinion, dated March 10, 1960, as Findings and Conclusions, and makes the following additional Findings and Conclusions:

III.

The fire was not caused by the design or neglect of Luckenbach.

IV.

It was caused by the gross negligence of Albina, as more particularly to be stated.

V.

Sterling was Luckenbach's port engineer, based in Seattle, with authority over repairs to Luckenbach's vessels in the Pacific Northwest, subject, however, to overruling authority in New York.

VI.

Radovich was a mere subordinate employee of Luckenbach. He was not a managerial officer. His functions were confined to Luckenbach's dock in Portland, where he arranged for the loading or discharge of cargo. He reported to his superiors in the Portland uptown office. He had nothing to do with repairs. Repairs were under Sterling.

VII.

Sterling did not know that the forward ladder was to be repaired. He left the ship between 3:00 and 4:00 in the afternoon, supposing that it was the after ladder that was to be repaired. The cargo near this after ladder was metal conduit, and it had all been discharged when the welders came aboard. It was 40 feet away from the forward ladder. Had the welding been done there, there would have been no fire.

VIII.

Sterling had made arrangements with the ship's chief engineer to hook up the ship's main fire line to the city water hydrant on the dock and so supply adequate water pressure to the ship while the section of the fire line was at Albina's yard for repairs. Sterling relied on the chief engineer to do this, and had a right to so rely. His delegation of this task was proper. It was not performed, due to the failure of a subordinate engineer.

IX.

Sterling knew nothing of the fire until his return

to the ship in the evening, at which time the Portland Fire Department was in control.

X.

Radovich had nothing to do with the repairs to the ladders. And there is no proof anywhere in the record that he knew anything about the removal of the section of the fire line, or the arrangements to supply substitute water from the dock hydrant. The Court finds that he did not.

XI.

The first Radovich knew that Albina's welders were aboard, or that a fire might be in No. 5 hold, was when he looked into that hold, shortly after 6:00 p.m. and saw sparks. Thereafter he acted with haste and dispatch in alerting the mate on watch, and calling the Portland Fire Department.

XII.

Neither Sterling nor Radovich was privy to the cause of the fire or its progress.

XIII.

The fire was caused solely by the gross negligence of Albina in the manner in which it attempted to do the welding. There was no welding at the after ladder, so that is eliminated. The welding at the forward ladder could have been safely done, if proper and usual precautions had been taken. There was ample space—between 2 and 4 feet between

the ladder and the cargo, in which to erect a fireproof, insulating screen, or curtain; notice to the ship's officers could have been given by the welders when they came aboard that welding was about to commence, and to have water ready; a hose either from the ship (if notice had been given) or from the dock could have been led into the hold with water pressure in it; one or more fire extinguishers could have been at hand. The requirements of the Portland City Ordinance regarding welding could have been complied with. If any of these precautions had been taken, there would have been no fire. Instead, none was taken. The only thing relied on was a can of longshoremen's drinking water left in the hold, which, of course, was utterly inadequate.

XIV.

Albina is a ship repair yard of many years' experience, and an expert in welding aboard ships.

XV.

Luckenbach employed Albina as an expert to do this welding and relied on Albina to do it safely and in a workmanlike manner, and had a right to so rely. It was a proper delegation.

XVI.

Albina at no time made any objection to Luckenbach that the conditions in the hold were dangerous or risky. On the contrary, it accepted those conditions without protest, and went ahead.

XVII.

There was no contract or understanding between Luckenbach and Albina, or any obligation, that Luckenbach would have its fire line in readiness and available during welding, and Albina in no way relied on it when it undertook the job.

Conclusions

I.

The fire was not caused by the design or neglect of Luckenbach within the meaning of the Fire Statute, U.S.C.A., Title 46, Sec. 182, R.S. 4282.

II.

Luckenbach is not liable to libelants for the cargo loss, damage, or expense, or otherwise.

III.

Even if liable, it would have a right to indemnity from Albina for all sums it might be compelled to pay to satisfy its liability.

IV.

Libelants have a right to recover from Albina all their damage and loss and expense caused by the fire.

V.

Luckenbach has a right to recover from Albina all its loss, damage and expense caused by the fire, and it is not liable to Albina for any contribution, indemnity or otherwise.

VI.

Albina does not have any right to collect its bill for repairing the fire damage to the ship.

VII.

An interlocutory decree should be entered accordingly.

May 16, 1960.

/s/ JOHN F. KILKENNY,
District Judge.

[Endorsed]: Filed May 16, 1960.

United States District Court
District of Oregon

Civil No. 9997 and Consolidated Cases

(Civil Nos. 10,001, 10,002, 328-59, 335-59, 336-59)

HERSHEY CHOCOLATE CORPORATION, a Delaware Corporation,

Libelant,

vs.

The S.S. ROBERT LUCKENBACH, Her Engines, Tackle, Apparel and Furniture; LUCKENBACH STEAMSHIP COMPANY, INC., a Delaware Corporation, and ALBINA ENGINE & MACHINE WORKS, INC., an Oregon Corporation,

Respondents.

LUCKENBACH STEAMSHIP COMPANY, INC., a Corporation,

Cross-Claimant,

vs.

ALBINA ENGINE & MACHINE WORKS, INC., an Oregon Corporation,

Cross-Respondent.

LUCKENBACH STEAMSHIP COMPANY, INC., a Delaware Corporation,

Cross-Claimant and Cross-Respondent,

vs.

ALBINA ENGINE & MACHINE WORKS, INC., an Oregon Corporation,

Cross-Respondent and Cross-Libelant.

INTERLOCUTORY DECREE

These consolidated causes having come on for trial on the segregated issues of liability, the libelants appearing by John G. Gearin, their proctor; Albina Engine & Machine Works, Inc., appearing by Gunther F. Krause, its proctor, and Luckenbach Steamship Company, Inc., appearing by Erskine Wood, its proctor, and the Court having heard the evidence and arguments of counsel, and having considered the briefs, and having made Findings of Fact and Conclusions of Law, and now being duly advised;

It Is Considered, Ordered and Decreed:

1. That in this Decree Hershey Chocolate Corporation, Longview Fibre Company and Waltham Bag and Paper Company, Zellerbach Paper Company and Northwest Grocery Company, Peyton Bag Company, W. E. Finzer & Company, and Hearst Publishing Company, Inc. (Pejepscot Paper Division), are collectively referred to as "libelants"; the S.S. Robert Luckenbach, etc., and Luckenbach Steamship Company, Inc., are referred to as "Luckenbach"; and Albina Engine & Machine Works, Inc., is referred to as "Albina";

2. That libelants have and recover nothing from Luckenbach, and their libels, insofar as they are against Luckenbach, are hereby dismissed;

3. That libelants have and recover of and from Albina their damages, to be later determined;

4. That Luckenbach have and recover of and from Albina its damages to be later determined;

5. That Albina have and recover nothing from Luckenbach either on its repair bill or by way of indemnity or contribution, or otherwise; its cross-claims and cross-libel are hereby dismissed;

6. That the prevailing parties shall have and recover their costs and disbursements, to be taxed in the Final Decree.

Dated May 16, 1960.

/s/ JOHN F. KILKENNY,
U. S. District Judge.

[Endorsed]: Filed May 16, 1960.

[Title of District Court and Cause.]

Civil No. 9997 and Consolidated Cases

(Civil Nos. 10,001, 10,002, 328-59, 335-59, 336-59)

NOTICE OF APPEAL

Notice is hereby given that Albina Engine & Machine Works, Inc., respondent, cross-respondent, and cross-libelant, in the above-entitled causes, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the interlocutory decree of the United States District Court for the District of Oregon entered in the above-entitled cause, Civil No. 9997, and consolidated cases, Civil Nos. 10001, 10002, 328-59, 335-59 and 336-59, entered on May 16, 1960.

KRAUSE, LINDSAY &
NAHSTOLL,

/s/ GUNTHER F. KRAUSE,

Proctors for Respondent, Cross-Respondent and Cross-Libelant Albina Engine & Machine Works, Inc.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 27, 1960.

[Title of District Court and Cause.]

Civil No. 9997 and Consolidated Cases

(Civil Nos. 10,001, 10,002, 328-59, 335-59, 336-59)

BOND FOR COSTS ON APPEAL

Whereas, Albina Engine & Machine Works, Inc., respondent, cross-respondent and cross-libelant, has appealed to the United States Court of Appeals for the Ninth Circuit from the interlocutory decree made and entered in this cause on the 16th day of May, 1960, as set forth more fully in said respondent's, cross-respondent's and cross-libelant's Notice of Appeal; and the said respondent, cross-respondent and cross-libelant and St. Paul Fire & Marine Insurance Co., a surety company duly authorized to do business in the State of Oregon, hereby consenting and agreeing that in case of default or contumacy, on the part of respondent, cross-respondent and cross-libelant, or its surety, execution may issue against their goods, chattels and lands in the sum of Two Hundred Fifty Dollars ($250.00);

Now, Therefore, it is hereby stipulated for the benefit of whom it may concern that the stipulators undersigned are jointly and severally bound in the sum of Two Hundred Fifty Dollars ($250.00), conditioned that respondent, cross-respondent and cross-libelant shall pay the costs, if any, awarded by the United States Court of Appeals for the Ninth Circuit upon the appeal of this cause.

Dated at Portland, Oregon, this 31st day of May, 1960.

ALBINA ENGINE & MACHINE WORKS, INC.,

/s/ ALAN H. JOHANSEN,
Of Proctors for Respondent, Cross-Respondent and Cross-Libelant Albina Engine & Machine Works.

[Seal] ST. PAUL FIRE & MARINE INSURANCE CO.,
Surety;

By /s/ ADDISON P. KNAPP,
Attorney-in-Fact.

Countersigned:

JEWETT, BARTON, LEAVY & KERN,

By /s/ ADDISON P. KNAPP,
Resident Agents.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 1, 1960.

United States District Court
District of Oregon

Civil No. 9997

(Also: Civil Nos. 10,002, 335-59, 336-59 and 328-59)

HERSHEY CHOCOLATE CORPORATION, a Delaware Corporation,

Libelant,

vs.

The S.S. ROBERT LUCKENBACH, etc., et al.,

Respondents.

January 6, 1960

Before: Honorable John F. Kilkenny, Judge.

Appearances:

MR. JOHN GORDON GEARIN,
Of Proctors for Libelant.

MR. ERSKINE WOOD,
Of Proctors for Respondent Luckenbach Steamship Company.

MESSRS. GUNTHER F. KRAUSE and ALAN H. JOHANSEN,
Of Proctors for Respondent Albina Engine & Machine Works.

TRANSCRIPT OF PROCEEDINGS

The Court: Are the parties and the Proctors ready for trial in Hershey Chocolate vs. Luckenbach, Civil 9997, and consolidated cases?

Mr. Gearin: The libelants and each of them are ready, your Honor, upon the understanding that the pretrial order has been approved by the Court.

The Court: Proctors for respondents?

Mr. Wood: Luckenbach is ready, your Honor.

Mr. Krause: Albina is ready.

Mr. Wood: I don't believe the pretrial order has been signed.

The Court: The pretrial order is before the Court, and I have this question to ask with reference to it. Is there any reason that the pretrial order does not supersede the pleadings?

Mr. Gearin: The pretrial order in its present form, your Honor, was put in that form at the insistence of Mr. Wood. He will have to answer that question. Personally, I have no objection to the pretrial order superseding the pleadings.

The Court: Mr. Wood, what do you have in mind in particular as the reason the pretrial order does not supersede?

Mr. Wood: I would really prefer Mr. Krause answer that.

The Court: We will have Mr. Krause answer it, then.

Mr. Krause: The rules of the District Court have been, according to my understanding, drafted giving the attorneys the [2*] option to have the pretrial order supersede the pleadings or to supplement them. This case is one where there are five or six suits combined. I haven't done a great deal

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

of work on the cases. It has been handled by Mr. Johansen, and I am not entirely familiar with all of the issues. I think they are all right. But we felt in this case because of the fact that there were quite a number of cases we should be able to rely upon the pleadings if it became necessary to do so. There are libels, cross-libels, interpleaders, and about every way of getting parties into a case that there is in admiralty.

The Court: In other words, Mr. Krause, there is nothing specific. Of course, what the Court is interested in here is if there is some real, specific reason for not superseding the pleadings I would like to have that pointed up at the present time so that I may have it in mind during the course of the trial.

Mr. Krause: There is nothing special, your Honor, excepting that in view of the number of cases involved and the different claims and defenses between the parties, particularly between Mr. Wood and ourselves, we would prefer not to have the pleadings superseded. As far as we are concerned, whether the pretrial order supersedes or doesn't, we would agree that any party should be permitted to amend the pretrial order at any time either for the purpose of bringing in additional exhibits or even for the introduction of new issues. If that [3] were the understanding, then we would be prepared to go ahead with the pretrial order.

The Court: I think that is already part of the pretrial order here as prepared.

Mr. Krause: Yes; it is.

The Court: I will sign the order as it is presently drafted. The difficulty we have under the rule where the pretrial order does not supersede, of course, is where we have a jury involved. As you gentlemen can well recognize, the Court might be at a loss to understand the issues where you reserve issues in the pleadings and also issues under the pretrial order.

The order will be signed.

Mr. Gearin, do you want to proceed?

Mr. Gearin: Yes, your Honor, if I may. Has the Court received the memorandum that we delivered yesterday in this case? I think if your Honor has had the opportunity of reading it, I would dispense with any opening statement at this time.

The Court: I might say that I have not had an opportunity to read it, Mr. Gearin.

Mr. Gearin: Very well.

(Opening statements were made to the Court by Proctors for the respective parties, and thereafter the following occurred:)

The Court: You may proceed.

Mr. Gearin: We would like to introduce in evidence, your [4] Honor, our Pretrial Exhibit No. 1, which is a copy of the transcript of the investigation. There is attached on the first page a paper that we have prepared, which is an index of the witnesses and the pages in the transcript where their testimony appears.

Mr. Wood: May I ask a question? Are those diagrams that one of the witnesses drew attached to that?

Mr. Gearin: They are. Those are the official Coast Guard exhibits.

The Court: Mr. Wood, you are familiar with that exhibit?

Mr. Wood Yes; I am.

The Court: Do you have any objection?

Mr. Wood: No objection whatever.

The Court: Mr. Krause?

Mr. Krause: I have none.

The Court: The exhibit is admitted.

(Transcript of Testimony before the United States Coast Guard, Merchant Marine Investigating Section, above referred to, was received in evidence as Libelants' Exhibit 1.)

Mr. Gearin: The second exhibit of the Libelants, your Honor, is Exhibit No. 2, which is the original City of Portland, Oregon, District Agent's Fire Report.

The Court: Mr. Wood? [5]

Mr. Wood: I have never seen that, but I don't think I have any objection to it. May I reserve an objection until later?

The Court: You continue, and then we will have a recess here shortly and you can examine that, Gentlemen.

Mr. Gearin: Our third exhibit, your Honor, is a copy of the regulation contained in the Title 46, Code of Federal Regulations, Section 146.20-02.

Mr. Wood: No objection to that.

Mr. Krause: That is the Federal Code?

Mr. Gearin: Yes.

Mr. Krause: We have no objection to it.

The Court: Exhibit No. 3 is admitted.

(Copy of the section of the Code of Federal Regulations above referred to was received in evidence as Libelants' Exhibit 3.)

Mr. Gearin: Exhibit No. 4 is a copy of the Police Code of the City of Portland——

Mr. Wood: Is that the one about waterfront facilities?

Mr. Gearin: No. This says, "When any welding or burning is in progress on any vessel," and so forth.

Mr. Wood: Is that the waterfront facility one?

Mr. Gearin: No; it is not.

Mr. Krause: We object to that. That is one of these local regulations that vary the uniformity of the Maritime Law. We [6] don't think that the City ordinances have anything to do with the management and control of a vessel when the Coast Guard—that is the United States, through the Coast Guard—has made all the regulations that have anything to do with the vessel. They have entirely occupied that field. The City of Portland does not make any regulations that are going to be binding on an Admiralty Court or binding on the parties.

Mr. Gearin: Our answer to that, your Honor,

is that Page 9 of the pretrial order, Paragraph V, contains this recital:

"At all times there were in full force and effect the following regulations:

"City Ordinance of the City of Portland, Section 16-2527, passed by the City Council of the City of Portland."

Now, with regard, your Honor, to whether or not this applies in admiralty, in 46 Code of Federal Regulations, 146.01-12, to which reference is made on Page 19 of our brief, the Federal regulations do not pre-empt this field, because the Code of Federal Regulations regarding the Coast Guard regulations which we have here provide,

"Nothing in the regulations in this chapter shall be construed as preventing the enforcement of reasonable local regulations now in effect or hereafter adopted when such regulations are not inconsistent or in conflict with the provisions [7] of the regulations in this act."

Our position, your Honor, is that the Police Code, which probably your Honor has not read, has certain mandatory directions relating to the precautions to be taken when welding is to be performed which are applicable to this case. They are not in conflict with the Code of Federal Regulations, but merely require certain precautions for welding and requires certain fire extinguishers and fire hoses to be in effect. I think, your Honor, first of all you ought to read the Police Code.

The Court: Exhibit 4 will be admitted. If Coun-

sel have any opposition, in any memorandum that you may file you may cite such authorities as you may have that might show the ordinance is not applicable.

(Copy of Section 16-2527 of the Police Code, above referred to, was received in evidence as Libelants' Exhibit 4.)

LIBELANTS' EXHIBIT No. 4

Police Code

Section 16-2527. Burning and Welding. When any welding or burning is in progress, on any vessel, a suitable fire hose, with nozzle attached, shall be connected with a nearby fire hydrant and a test must be made, before any such welding or burning commences and occasionally while it is still in progress and said hose shall remain, ready for instant use, at least for one hour after any such welding or burning has been completed. A test must be made from time to time during the progress of any such operations. A competent attendant, equipped with not less than one, four pound, CO2 fire extinguisher, at hand and ready for instant use, shall be on hand and ready to act during each such welding or burning operation. If during any such operation, there will be a transmission of heat, through a bulkhead or above or below a deck where any such work is being done, a fire watch shall be maintained on both sides of the bulkhead or deck. Special attention shall be given where any such

operations take place, near a refrigerator compartment or ventilator from any gaseous hold or compartment.

Received in evidence January 6, 1960.

Mr. Gearin: Now, your Honor, there is testimony at Page 50 by a Witness Beeler, a witness called by the Coast Guard, who is a member of the Coast Guard, and he testified on Page 50 that the Luckenbach Terminal, where the repairs were being made, at the time of this fire was "a waterfront facility."

Based upon that testimony we offer into evidence Libelants' Exhibit No. 5, which is a copy or a reprint of the Federal Register applying, which is 33 Code of Federal Regulations, Section 126.15, which likewise the parties have [8] stipulated in Paragraph V on Page 9 of the pretrial order as being in full force and effect at the time of this fire.

There is testimony in this case, your Honor, by the Coast Guard that this Federal reprint was sent to Luckenbach prior to the fire because of repeated violations of this regulation in Portland. That is on Page 53 of the testimony of Lieutenant Beeler, testifying for the Coast Guard.

The Court: What is the general nature of the regulation?

Mr. Gearin: The regulation, your Honor, prohibits welding or hot work on waterfront facilities

except when approved by the Captain of the Port. There will be testimony in the case that the Captain of the Port was not advised of the fact that welding was going to be taking place, and there was also testimony by Mr. Beeler of the Coast Guard, on Pages 52 and 53 of the transcript, that had the Coast Guard been notified they would have had a representative of the Coast Guard at the scene and would have required that the vessel furnish a fire watch and take precautions.

The Court: Mr. Wood?

Mr. Wood: Yes. We object to that regulation about waterfront facilities, your Honor, because it is clearly irrelevant. No welding was done except on the ship. There wasn't any welding done on the dock. There is no question about that. A waterfront facility is, by the very regulations, defined as follows:

"A waterfront facility as used in this part [9] means all piers, wharves, docks, and similar structures to which vessels may be secured, and buildings on such structures or contiguous to them, and equipment and materials on such structures or in such buildings."

Obviously, that does not refer to welding on a ship. It say "structures to which vessels may be secured." I don't know why that is introduced at all.

The Court: Mr. Krause?

Mr. Krause: We object to it on the same grounds, your Honor.

The Court: Mr. Gearin, do you have anything more to say on that?

Mr. Gearin: No.

The Court: The objection will be sustained as to No. 5. It will be considered as an offer, though, of course, Mr. Gearin.

Mr. Gearin: Thank you. Your Honor, our next exhibits are Exhibits 6-A to 6-F, inclusive, being the bills of lading. We have a stipulation in the pretrial order to the effect that the goods were delivered aboard the vessel in apparent good order and condition. The bills of lading are offered only with the thought that they provide a basis for our contention that cargo may hereafter be compelled to respond in general average, and one of the issues as set forth in the pretrial order and discussed in our memorandum is whether or not Albina [10] would be required to indemnify cargo against a general average contribution. It is only offered for that purpose.

Mr. Krause: Isn't there another suit pending in that connection?

Mr. Gearin: That is the Longview Fibre case, which has not been consolidated. This offer has nothing to do with the Longview Fibre case, which is being held in abeyance pending this case, and it applies only to the particular cargo that is involved in this action.

Mr. Krause: I don't see how it can possibly come in at the present time. A general average contribution might be an assessment against cargo for the preservation of that cargo, if they had thrown

a lot of cargo overboard, for example, in order to save other cargo. There is nothing of that sort in this case that I know of, and I therefore can't figure out just why that should be in the case.

Mr. Gearin: This matter, your Honor, has to do with our contention as contained in the pre-trial order, our Contentions, Nos. VI, VII and VIII, having to do with the claimed right to indemnification in the event of any claim of general average contribution.

The Court: That exhibit will be admitted.

(The bills of lading above referred to were received in evidence as Libelants' Exhibits 6-A to 6-F, respectively.) [11]

Mr. Gearin: Your Honor, we have introduced the testimony on behalf of the Libelants. Also, I understand from one of counsel that the water can which is on the window sill is the water can that was in the hold.

Mr. Wood: No, it is not the actual can. It is one similar.

Mr. Gearin: It is one similar. We ask that that be received in evidence. It has a number on it, I think.

The Clerk: Exhibit 26.

The Court: That will be admitted.

(The water can referred to was thereupon received in evidence as Libelants' Exhibit 26.)

Mr. Gearin: I have one exhibit which is No. 7. That is a sealed exhibit for impeachment purposes

only, and we will, of course, make no use of that at this time. We have to retain that.

Now, your Honor, the pre-trial order contains a recital on Page 21 as follows:

"* * * that in accordance with the long-established practice in admiralty, both this order and the pleadings may be freely amended at any time to promote justice in the correct determination of these causes."

In the memorandum which I have served upon opposing [12] counsel yesterday forenoon, I believe, and which we filed with the Court yesterday, we stated at that time that we proposed to amend the pre-trial order to charge an additional ground of negligence against the respondents, and each of them, in the particulars set forth on Page 27 of our memorandum, and which is based upon the testimony of Kenneth W. Post, Assistant Fire Chief, on pages 168 to 170 of the transcript, and the testimony of Cecil F. Roth, Battalion Chief of the Fire Department, on Page 187.

We ask that the pre-trial order be amended to charge the respondents with negligence in failing to properly report the fire to the Portland Fire Department.

With that statement, your Honor, and with the further statement that that is the specific evidence upon which we rely as related to the specific charges of negligence against each of the respondents, and that the statutory and case authority in support of our position is found in our trial memorandum, I don't think that any further argument is necessary

until your Honor has had a chance to review the testimony and to study the authorities.

With that we rest.

The Court: Mr. Gearin, what would be the language of the amendment which you propose?

Mr. Gearin: The language will be this, your Honor: In the pre-trial order we have contentions made against Luckenbach, [13] and in Paragraph III of our Contentions, which appear on Pages 10 and 11 of the pre-trial order, this will be a fourteenth charge of negligence, consisting of the words: "It failed to promptly report the fire to the Portland Fire Department."

The Court: Are you proposing a similar specification against Albina?

Mr. Gearin: Yes, your Honor, which will be in Paragraph IV of our Contentions, page 12, subdivision 11, consisting of the same words.

The Court: Do you have any objection to the amendment as to Luckenbach?

Mr. Wood: No, I think under the admiralty practice he is allowed to make it.

The Court: And you, Mr. Krause?

Mr. Krause: We have no objection.

The Court: The amendment will be allowed.

Mr. Gearin: The libelants and each of them rest, your Honor.

The Court: Mr. Gearin, I would ask you to prepare that amendment in proper form so that it can be submitted to opposing counsel and submitted to the Court so that we may attach it as part of the pre-trial order.

Mr. Gearin: I shall do so during the noon hour.

The Court: Yes. Mr. Wood?

Mr. Wood: We have some exhibits, your [14] Honor.

The Court: I think we will have a ten-minute recess. During that period of time you may check into that one exhibit.

(Short recess.)

Mr. Wood: I was about to offer the Luckenbach exhibits.

The Court: Yes, Mr. Wood.

Mr. Wood: Exhibit No. 23 is Bill's Recording Service transcript of the Coast Guard testimony.

Mr. Gearin: I understand, your Honor, from Counsel this is being offered as his is more readable than the copy which we have offered. Am I correct on that?

Mr. Wood: Yes.

Mr. Gearin: We have no objection.

Mr. Krause: I have no objection, your Honor.

The Court: Admitted.

(The transcript of testimony before the United States Coast Guard, above referred to, was received in evidence as Respondent Luckenbach's Exhibit 23.)

RESPONDENT'S EXHIBIT No. 23

Before The United States Coast Guard
Portland, Oregon

In the matter of:

PRELIMINARY INVESTIGATION TO INQUIRE INTO DAMAGE SUSTAINED BY FIRE ON BOARD THE S. S. ROBERT LUCKENBACH, O/N 245, 923, WHILE MOORED AT LUCKENBACH TERMINAL, PORTLAND, OREGON, ON OR ABOUT 2 APRIL, 1958.

TRANSCRIPT OF PROCEEDINGS

Room 202, Lincoln Building,
Portland, Oregon—Thursday, April 3, 1958.

Met, at 1:20 o'clock p.m.,

Before: Carol L. Mason, Lieutenant Commander, USCG; Senior Investigating Officer, Portland, Oregon.

Appearances:

ERSKINE WOOD, ESQ.,
1310 Yeon Building, Portland, Oregon;
Appearing on Behalf of Luckenbach Steamship Company.

KENNETH E. ROBERTS, ESQ.,
Board of Trade Building, Portland, Oregon;
Appearing on Behalf of Captain J. W. Maitland, Master, S. S. Robert Luckenbach.

Respondent's Exhibit No. 23—(Continued)

GUNTHER KRAUSE, ESQ.,
Portland Trust Building, Portland, Oregon,
and
MR. E. STUART GRYZIEC;
Appearing on Behalf of Albina Engine & Machine Works.

Proceedings

Lt. Cmdr. Mason: It is now 1320 Pacific Standard Time on this 3rd day of April, 1958, and these proceedings will come to order.

The following opening statement is made in compliance with existing regulations:

This preliminary investigation is convened under the authority of R. S. 4450, as amended, and the regulations promulgated pursuant thereto, to inquire into the damage sustained by the S. S. Robert Luckenbach, official number 245 923, which occurred on or about 2 April, 1958, while moored at Luckenbach Terminal, Portland, Oregon. This investigation will attempt to determine the cause of the casualty to the extent ascertainable and when such information has been compiled in the form of a record, it will be used as a basis for making any recommendations as may be indicated for the prevention of accidents or casualties of the same or similar nature. The investigation will further determine whether there was any incompetence, misconduct, unskillfulness or local violation of navigation law on the part of any licensed officer, pilot,

Respondent's Exhibit No. 23—(Continued)

seaman, employee, owner, agent or operator of any of the vessels involved; or any person who may have caused or contributed to the casualty.

In accordance with 136.23-1, 46 Code of Federal Regulations, if, as the result of this investigation, there is evidence of criminal liability on the part of any person, such [3*] evidence will be referred to the U. S. Attorney General's Office for action and such further investigation as deemed necessary or required by that office. Section 136.13-1, 46 CFR, Sections A, B, C and D thereunder prescribe who will be afforded copies of this record of investigation, the expenses involved in obtaining same, and the method for making application.

This investigation will not fix civil responsibility nor is such intended by these proceedings.

Before beginning this investigation, I should like to state at this time that the particular parties who appear to be interested parties in this investigation would be the Master and crew of the S. S. Robert Luckenbach, and the owner and/or agents or both of the Luckenbach firm and also the Albina Engine and Machine Works, Portland, Oregon. It is my understanding that the attorneys now present have entered into a stipulation that they have no objection to each and all being present together during the testimony furnished by the various witnesses which will be called by the Government; and the Government has no such objection. Is that correct, Mr. Wood?

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

Respondent's Exhibit No. 23—(Continued)

Mr. Wood: That is correct.

Mr. Roberts: As far as I am concerned, that is correct. I don't know how Mr. Gryziec feels.

Mr. Gryziec: I will agree.

Lt. Cmdr. Mason: And we will now have appearances then for the [4] record.

Mr. Wood: I am Erskine Wood, 1310 Yeon Building, appearing for Luckenbach.

Mr. Roberts: Kenneth E. Roberts, 10th floor, Board of Trade Building, appearing presently for Captain J. W. Maitland, Master of the S. S. Robert Luckenbach.

Mr. Gryziec: E. Stuart Gryziec, Glens Fall Insurance Company; representing Albina Engine and Machine Works.

Lt. Cmdr. Mason: I will state at this time that if there are any questions regarding the procurement of a transcription of the testimony, I will be glad to answer those questions at any time after we adjourn. At the present time, it is not possible to state whether or not it will be necessary for the Coast Guard in their interests to transcribe the record. However, even though they may not, there are ways that it can be done for interested parties.

Are there any questions before we call the first witness?

(No response.)

Respondent's Exhibit No. 23—(Continued)

LESTER LAWRENCE SMITH

was called as a witness by the United States Coast Guard, and first having been duly sworn, was examined and testified as follows:

Examination

By Lt. Cmdr. Mason:

Q. Would you please state your full name and address?

A. Lester Lawrence Smith, 1928 S. E. 130th, Portland. [5]

Q. And what is your occupation, Mr. Smith?

A. Boilermaker foreman.

Q. How long have you been employed in that occupation?

A. The biggest part of—I am going on sixteen years at Albina. I have been a leadman or a foreman most of the time.

Q. You are employed by Albina Engine and Machine Works?

A. Albina Engine and Machine Works.

Q. And are you aware that there is a representative of that firm present now representing you here?

A. Yes.

Q. Now, it is my understanding that you were aboard the S. S. Robert Luckenbach at the Luckenbach Terminal in Portland, Oregon, on yesterday's date, 2 April, 1958, is that correct, sir?

A. Yes, sir.

Q. When did you board the vessel?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)

A. Approximately ten minutes to six.

Q. And what was the purpose of boarding?

A. To install a ladder rung in number five lower hold forward.

Q. What specifically would be your duty or work involved in the installation? Of this ladder rung?

A. Well, I was supposed to oversee the installing, is that what you mean?

Q. Well, was this installation to require welding?

A. Welding, yes.

Q. And—but your particular job was not that of handling [6] the welding equipment, was it?

A. No, sir.

Q. What then did you do, merely supervise the work?

A. Well, I had two men there and I had this one man—we didn't take a burning torch down in the hold. I had him cut the rung for length and brought it down and—— (interrupted).

Q. Now, before we proceed too far here, when you first boarded the vessel, you stated about ten minutes of six. That was in the evening?

A. Yes, sir.

Q. Were these other two men with you?

A. They were aboard ship, yes, sir.

Q. They were already aboard?

A. Well, either there or on the dock. They were there before I got there.

Q. I see. Now, who are these other two men?

A. One is Larson and Leo Riley—R-i-l-e-y.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)

Q. And are they both employed also by Albina?

A. Yes, sir.

Q. I see. And when you went down aboard, did you take any equipment with you?

A. With me? No.

Q. Was there—— (interrupted).

A. Outside of—no, I didn't take any equipment myself, no.

Q. Had any plans been made for welding equipment to be furnished [7] for this particular job?

A. Yes, sir; we had a portable delivered on the dock.

Q. And was it on the dock when you boarded the vessel? A. Yes, sir.

Q. Were the wires from this equipment already rigged to the vessel, do you know?

A. No, sir.

Q. They were not? A. No.

Q. Now, when you went aboard, what did you do first? Did you contact the other two men?

A. I contacted them before they got there and afterwards, and I told the welder to string the welding lead down into number five lower hold.

Q. I see. Did you contact anybody on the ship who was a member of the ship's force, such as any of the ship's officers relative to this job?

A. No, sir.

Q. Now, you told him to go ahead and string the wire down into the hold. What did you do then? Did you proceed to the hold?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)

A. I went down the hold myself.

Q. And was this number five hold?

A. Number five lower hold.

Q. I see. Now, when you went down there, what did you find? [8]

A. Well, I found that there was cargo at the forward end of the hatch, forward of the ladder, by approximately—this is approximate, I would say—between two and three feet forward of the ladder, was this cargo, and then there was a vacant space approximately ten feet where there was no cargo, where the bare landing was exposed.

Q. I see. Where was this in relation to the hold? To the port or starboard?

A. Well, the ladder is on the center of the hatch and the cargo was port and starboard—in other words, clear across the width of the ship.

Q. I see. Now, you noticed that there was a rung missing or broken on the ladder?

A. Yes; yes.

Q. What was it, missing or broken?

A. It was missing.

Q. It was actually missing? A. Yes.

Q. The entire rung from both sides?

A. The entire rung was out, yes.

Q. I see.

A. They had a temporary rung fixed in there.

Q. When you say a "temporary rung," was that the type that is hung from an upper rung—— (interrupted). A. That's right, yes. [9]

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)

Q. ——in a short ladder form?

A. Yes.

Q. That had already been rigged when you got down there? A. Yes, sir.

Q. Now, did the other two men rig this wire from the welding equipment down into the hold?

A. I wouldn't want to say whether both of them did or not, no, but I know that Mr. Larson was one of them. Maybe Riley helped him. I am not positive.

Q. Now, were you in the hold when it was lowered down? A. I was in the hold, yes, sir.

Q. I see. Now, someone lowered it down, in either event, and you know it was one of the two men that was with you? A. Yes, sir.

Q. But when it was lowered, was there anything on the end of this wire?

A. I wouldn't swear to it.

Q. Electrode clips or anything of that sort?

A. I wouldn't swear whether he had the stinger hanging on it or not.

Q. I see. Would that require two wires separate or would it have been one lead with the two wires enclosed?

A. No, it would only be one lead. We weld a ground up on deck before the welding—— (interrupted).

Q. I see, and then bring the welding lead down into the hold? [10] A. That's right.

Q. I understand. Now, what originally or how

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)
did you originally receive your orders to board this particular ship at this particular time for that repair?

A. Well, I don't know which I got it from first. I know that Mr. Dixon (phonetic) is the general foreman. He told me I had the job to do. Also Mr. Bailey. Mr. Bailey is the man that is actually the boss—— (interrupted).

Q. Is he shop foreman?

A. No, he's—I don't know, superintendent or what his title is, but the coordinator. In other words, he is the man that was handling this particular job.

Q. And both of those gentlemen advised you of this repair to be done?

A. Yes, of the repair which was to be done. Dixon—I don't know if he had been on the ship, but as far as that goes, he told me I had this job to do between six and seven.

Q. Oh, he did say that it was to be done between six and seven? A. Yes.

Q. Did he clarify why it was to be done at that particular time?

A. Well, no; he didn't clarify it, but—— (unfinished).

Q. Did you have any knowledge as to why you had to go aboard at that particular time?

A. Yes, my idea was because the longshoremen wouldn't be [11] working at that time.

Q. I see.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)

A. They were off between six and seven.

Q. In other words, that would normally be the longshoremen's dinner hour or change of shift?

A. The change of shifts.

Q. I see. All right, now, getting back to the wire that was let down into the hold, did anyone else come down into the hold then with you?

A. All three of us were down there.

Q. Well, now, that's—the other two came down after the wire was lowered into the hold?

A. It's hard to say now. Maybe one of them may have been down in the hold with me at the time.

Q. I see. You are not too sure?

A. I wouldn't swear to it, you know, I—— (interrupted).

Q. But in either event, we now have the three men down in the hold with the wire down there?

A. Yes, sir.

Q. This would be about what time, would you estimate? A. It was very shortly after six.

Q. And had the longshoremen—— (interrupted).

A. They had left.

Q. ——stopped work?

A. They'd left. [12]

Q. Let me ask you this: Had they left at the time you boarded the ship at ten minutes of six?

A. Yes, sir.

Q. They had? A. Yes.

Q. Was it dark in the hold at this time?

A. No.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)

Q. It was not. Were there lights on down there or were you just receiving the light from sunlight through the open hatch?

A. The hatch was open.

Q. The hatch was open.

A. All the way down to the bottom. The 'tween deck was open and part of the main deck.

Q. All right, now, what happened next, as you saw it. Did they hook up the electrode to the wire, or what did happen?

A. No, of course, it was hooked up and as I say, I seen this cargo and figured I would take the precautions. This ladder rung was fairly low—come about chest high on me.

Q. Indicating chest high on you or approximately four feet?

A. Between four and five feet, I would say.

Q. That would be above the upper level of the cargo, would that be right? The cargo on which you were standing?

A. There was no cargo. I was standing on no cargo.

Q. You were standing on no cargo?

A. On the landing pad itself. At this particular spot, there [13] was no cargo and the cargo was forward of this, and—— (interrupted).

Q. Well, I am speaking—— (interrupted).

A. ——I had taken what they call pallets, I believe—or not pallets, but these—maybe someone can advise me of what they call them—these plywood

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)
boards that are approximately four to five—walking boards. I took two of those and leaned them up against the cargo, both sides of the ladder, and then they had some case goods of approximately the same square footage. I stood one of those up to make a box around this ladder so any sparks that fell, I figure it would hold, and then I took what I thought was an added precaution and put a one inch board next to the plywood, you know, so as to make it more of a tight joint, so that there wouldn't be any sparks go through. This welder—I tried the rung in there and it seemed to be just a trifle too long. There was a little stub of the weld stuck out to where it was keeping me from getting—the rung was long—or was short enough, if it wasn't for this old weld from the old rung, and I had the welder start to melt a little bit of this weld off—— (interrupted).

Q. Now, when you speak of the "welder," to whom do you refer? A. Larson.

Q. Larson?

A. Yes. I asked him to melt a little of that weld off to where I could get the rung in. He no more than struck the arc, [14] actually, that the sparks, I seen them roll towards the plywood. So I told him to hold up for a minute—pulled the plywood back, and there was flames. I had a bucket of water there and I threw it on, but it just took off in between the bales, to where I couldn't get the water to it by pouring it on. I couldn't—— (interrupted).

Q. What were these bales, do you know?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)

A. Burlap.

Q. Burlap? A. Yes.

Q. Now, I want to be sure that I have this absolutely correct, Mr. Smith. Directly in front of the ladder where you were standing and where the welder was standing—— (interrupted).

A. Forward of the ladder.

Q. Well—— (interrupted).

A. It would be forward of us, yes, sir.

Q. Forward—you would be standing just abaft the ladder. The ladder would be in front of you?

A. That's right.

Q. Were you standing on the deck—on the tank tops?

A. On the—not the actual tank top; the landing pad, yes, sir.

Q. The landing pad. There was no bale of burlap beneath you there? [15] A. No, sir.

Q. And no other cargo beneath you there?

A. No, sir.

Q. I see. And that area was approximately how large, would you say, where—— (interrupted).

A. Between the two bunches of cargo? I would say approximately twelve feet.

Q. In width? A. Yes, sir.

Q. And about how much fore and aft?

A. No, width—width—the full width of the hatch.

Q. The full width of the hatch, port and starboard? A. That's right.

Q. But now I am speaking of fore and aft, how much?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)

A. Well, I was going to say, approximately twelve feet.

Q. Oh, both ways? A. No.

Q. Twelve foot square? A. No, sir.

Q. Well, you are not making yourself clear then to me, Mr. Smith.

A. Yes; yes—forward of the hatch, from port to starboard shell. In other words, approximately forty-five feet.

Q. I am going to hand you a piece of paper, Mr. Smith, and ask you if you will just draw an outline of that (paper handed). [16] Now, if you will just draw a sketch showing the outline of the cargo hold—of the entire cargo hold, and then within that area, if you would show by dotted line, the cargo hatch?

A. Yes, that will give you your 'tween deck, too.

Q. And then at the appropriate end, if you would just mark FWD for forward, meaning forward end of the ship. And now, if you would indicate where the ladder is located and draw an arrow to it and just write "ladder." That's right. Now, if you will draw there, using a pencil, the outline of where there was no cargo—in other words, where the bare deck is exposed.

A. (Witness drawing diagram.)

Q. Now, that width from port to starboard, I believe you stated was approximately twelve feet?

A. Approximately, yes.

Q. And that would indicate the full width of the ship as you have it there, isn't that right?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)

A. That's right; that's right, sir.

Q. Oh, then that's not twelve feet?

A. No, twelve feet fore and aft.

Q. Now, I understand. Now I have it. If you would sign that for me if you please?

A. (Signing diagram.) I don't know what the outer cargo was at the after end, just—— (interrupted).

Lt. Cmdr. Mason: Let the record show that this sketch which has been marked Coast Guard Exhibit 1 is Mr. Smith's recollection of [17] the area of number five hold that was clear of cargo to the lower deck.

(Whereupon, the sketch above referred to was marked Coast Guard Exhibit 1.)

Q. Now, Mr. Smith, you said that when you pulled the plywood back, you found flames?

A. Yes, that's right.

Q. This was instantaneous? A. Yes, sir.

Q. Now, were these flames advanced or did they appear to be small and spread rapidly?

A. It spread rapidly—I mean, it wasn't a big blaze, but she was back in between the bales. I mean, the spark caught on fire and just seemed to spread back in between the bales.

Q. And then as I understand it, you took a bucket of water and threw it at the flames?

A. Yes, sir.

Q. How did that bucket of water happen to be

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)
there?

A. Well, I had it—I brought it from the other end of the hatch. I will tell you what, it was one of these longshoremen—I started up after a bucket of water and there was a drinking can was there which was full, so I took it from the after end of the hatch and brought it up to—— (interrupted).

Q. So this wasn't actually a fire bucket, but it was merely something that you found that had water in it and that was convenient and near at hand?

A. Well, same thing. It had a large opening at the top, as far at that goes. [18]

Q. But you didn't observe this until you started to go up after—— (interrupted).

A. Oh, no; before I ever started to weld, I—— (interrupted).

Q. You had noticed that bucket?

A. No, it was after in the hatch—I started up after a bucket of water and I found this down below.

Q. Oh, I see. Now I understand.

A. Oh, I figured on having fire protection, you know. I mean, having the water there, just for safety.

Q. Again I am a little confused, Mr. Smith. You had brought no water down with you at the time you were ready to commence to work?

A. Yes, sir.

Q. You had?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)

A. Water was there before the welder ever brought the stinger down.

Q. Was that this bucket that you referred to of water? A. Yes.

Q. That you ultimately used? A. Yes, sir.

Q. I see. And that was on the lower deck, or was it up on the 'tween deck?

A. No, it was right alongside of the ladder.

Q. Right alongside of the ladder?

A. It wasn't; I brought it up there, I mean, before we started [19] to burning.

Q. Before you started the burning?

A. Yes.

Q. I see. A. Before we started welding.

Q. Now, I take it from your past experience with the company that you have been doing this type of work—supervision of welding and so on in holds, at previous times, have you not?

A. Yes, sir.

Q. And has there been any practice or policy on your part relative to any safety devices or equipment that you keep at hand during these welding operations?

A. If I think there is any danger at all, I try to use every precaution.

Q. And did you feel that there was any danger existent for this particular operation?

A. No, sir; not after I had it fixed up, I mean.

Q. Even though the hold did have a cargo of burlap and paper?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)

A. That's right, because I thought I had it boxed in.

Q. With the plywood that you spoke of?

A. With the plywood and this carton—which was a heavy pasteboard carton that I had made one end with.

Q. I see.

A. Now, wait—I said—I want to retract on this—about this being all cleared in this space. There was—— (interrupted). [20]

Q. Let the record show the witness is referring to what he had previously indicated to be the space clear of cargo on his sketch of number five hold.

A. Let me say that there were some scattered pasteboard cartons approximately six inches deep by four foot square laying in this area, scattered, not a solid cargo.

Q. I see.

A. And the deck was visible everywhere.

Q. Now, Mr. Smith, referring to your sketch, and placing yourself in the position abaft the ladder, when this spark which you speak of that ignited the fire flew, in what direction did it go?

A. Forward. It rolled forward.

Q. It rolled forward, but how did it get over the plywood? A. It rolled under the plywood.

Q. Under the plywood? A. Yes.

Q. Now, I see. How low was this piece of plywood that you had across the back of the ladder?

A. It was supposed to be tight against the deck.

Q. I see.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)

A. At—around your hatch, which I know you are familiar with, they have these ramp—ramp plates so that they come up on the landing pad?

Q. Yes. Don't mark on the exhibit, please. [21]

A. All right. I'm not going to mark it, but I put this plywood from the landing pad up against the cargo, which made it as high—awfully close to as high as the ladder rung was, and—— (interrupted).

Q. The rung which you were going to weld?

A. That's right, but these sparks fell to the bottom and rolled on this ramp, like rolled underneath the—rolled underneath the plywood.

Q. I see. Then—— (interrupted).

A. This board that I had (indicating).

Q. Now, when you pulled that board back to look, did you pull it back to see whether that spark that had rolled under had gone out or did you pull it back because you noticed flames coming up?

A. No, I didn't notice any flames.

Q. I see. It wasn't until you actually pulled it back and then you saw the flames?

A. Pulled it back and then I seen them, yes.

Q. To your knowledge, was there any fire-fighting equipment rigged topside or any hoses led down in the hold at this time?

A. Let down in the hold—no, sir. There was a fire station right at the top of the hatch.

Q. When you speak of a fire station, you mean there was a hydrant up there?

A. Hydrant and hose. [22]

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)

Q. And a hose. Do you know if there was pressure to the hydrant?

A. No, sir. I didn't know up until—— (interrupted).

Q. There wasn't? But you didn't know at that time whether there was or wasn't? A. No.

Q. Was Mr. Bailey aboard at this time, do you know?

A. No, sir. Not that I know of. I say no, sir.

Q. As far as you know?

A. As far as I know.

Q. Now, after you threw the bucket of water that you had at the flames, what did you do next?

A. I hollered to Riley to get a fire hose.

Q. Where was Riley at this time?

A. He was in the hold. But I took off then, while he was getting a fire hose, I went down into the engine room and asked for water on the fire.

Q. Did you go up out of the hold?

A. Yes, sir.

Q. Out of the hatch and then down to the engine room? A. Yes, sir.

Q. And asked for water pressure on the fire mains, is that it? A. Yes; yes, sir.

Q. And then what?

A. Well, they didn't have any pressure on the fire mains, so I [23] went down and made three trips down to the engine room.

Q. I see. You came—— (interrupted).

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)

A. I did tell the guard at the gangway to call the Fire Department.

Q. The guard?

A. In fact, I believe I told him before I went to the engine room the first time. Now, I wouldn't—— (interrupted).

Q. Now, you said you went down to the engine room three times?

A. Yes. I thought that the man didn't know—— (interrupted).

Q. Who did you see when you went down to the engine room, do you know? A. No, sir.

Q. Would you recognize him if you saw him again?

A. I think I would, yes. He was dark complexed.

Q. Do you know if he was the engineer on watch?

A. I do not know. I surmised that he was.

Q. Where did you find him—in the lower deck plates? A. No, he was—— (interrupted).

Q. Upper grating?

A. He was coming up the ladder.

Q. I see, and what did you say to him?

A. I told him to get water on the fire line; had a fire in number five hold.

Q. You specifically told him there was a fire in number five [24] hold. What did he do then?

A. I don't know.

Q. Do you know whether he went back down the ladder, though, or did he follow you up?

A. No; no, he started down the ladder.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)

Q. And then you came back up topside?

A. That's right.

Q. Found that there was no water pressure and went back down again?

A. That's right, and told him and then he went back checking again.

Q. Where did you find him when you went down the second time?

A. Actually, I couldn't say for sure.

Q. Was it the same man?

A. I can tell you one man I seen down there, but I was so darned excited that I wouldn't—— (interrupted).

Q. I see. You are not sure that the second and third time you went down that it was still the same man?

A. That it was the same man. The only thing I will say, the third time I went down there, this—well, he got rather perturbed because—well, I was perturbed because I couldn't get water on the line and he told me to check with someone up on deck; that he had everything running down there.

Lt. Cmdr. Mason: Interrupting for just a moment, let the record show that we have a new arrival to this investigation. If [25] you will make your appearance, sir?

Mr. Krause: Gunther Krause; representing Albina Engine and Machine Works, I guess.

Lt. Cmdr. Mason: Before proceeding here, Mr. Krause, I should advise you that the method of this

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)

investigation at the present is in a preliminary stage, such that all of the attorneys have stipulated among themselves that they will agree to permit the others to be present at the testimony of each of their own witnesses; and I assume you have no objection to that similar stipulation?

Mr. Krause: I have none, no.

Q. Now, some time in the interim, when you were proceeding down to the engine room on these three successive times, you did notify the man at—on watch at the gangway to call the police, you are not sure just—— (interrupted).

A. Not the police, the Fire Department.

Q. Or rather the Fire Department?

A. Yes.

Q. You are not sure just when?

A. Which trip, no, I am not.

Q. I see.

A. And after I couldn't get any water, I did go out and make sure that they called the Fire Department to see if they had arrived.

Q. I see. Now, can you recall approximately how much time [26] elapsed during this period that you made the three successive trips and return from the engine room?

A. Just about as fast as I could go back and forth, sir. I didn't spend—I mean, we couldn't do any good when we didn't have water.

Q. Would it be safe to assume then that you were, at this time, rather excited?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)

A. Yes, sir.

Q. Did the gate watch or gangway watch ever advise you that he had notified the Fire Department?

A. No, I don't believe he did.

Q. Now, after your third trip to the engine room, what did you do next?

A. Waited for the Fire Department. It was too smoky then.

Q. Where did you wait? A. On deck.

Q. On deck?

A. Now wait a while. I did go out and try to contact Mr. Bailey and Mr. Dixon. I couldn't—I couldn't get ahold of Mr. Dixon so I called the warehouse and told them then to notify Dixon or Bailey that I had a bad fire.

Q. There was a lot of smoke coming out of the hatch? A. Yes.

Q. Did you notify the other two men to come out of the hold or were they still down there? [27]

A. Larson stayed down there while I was trying to get water on, until it got so smoky that he had to come out.

Q. And what happened to the other man?

A. He was up on deck at the valve.

Q. I see. Now, at any time, did you observe the mate on watch, or would you have recognized the mate on watch?

A. I didn't—not in this short time, I don't believe that I—— (interrupted).

Q. Didn't see him at all?

Respondent's Exhibit No. 23—(Continued)

(Testimony of Lester Lawrence Smith.)

A. Didn't see him at all.

Q. Was there anybody else at the hatch coaming at the time that you first came out to go down to the engine room for water? A. I don't know.

Q. Do you recall if there was anyone there when you came up the third time from the engine room?

A. I think there was men around there by that time. Well, I know there was men around there by that time, but I don't know who they were, whether they were talking—— (interrupted).

Q. Now, did you hear the ship's general alarm sound at any time? A. Yes, sir; yes, sir.

Q. You did? A. Yes, sir.

Q. When during the stage of your operations did you hear this sounded? [28]

A. Either the second or third time I went down.

Q. Went down where?

A. To the engine room.

Q. To the engine room? A. Yes.

Q. Did it come through loud and clear?

A. It seemed to, I mean—— (interrupted).

Q. You could hear it distinctly?

A. Oh, yes; from the engine room I could hear it distinctly.

Q. Did it sound prolonged, do you recall?

A. Well, I don't know—— (interrupted).

Q. Well, did it seem like it was just a short beep?

A. Oh, no; oh, no, no. It was a continuous ring.

Q. I see. And then after this sounded, was there any activity that you observed about the ship?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)

A. Oh, there was—yes, there was—surely.

Q. Now, you state that you then waited topside after your third trip to the engine room, you waited topside because of the smoke and for the Fire Department to arrive? A. Yes.

Q. In the meantime, while waiting, did you observe whether the ship's force rigged any fire-fighting apparatus? A. I didn't notice.

Q. You didn't notice? A. No. [29]

Q. Where were you standing specifically?

A. I was on the dock and back by the hatch there, trying to contact someone because the fire was out of my hands when I couldn't get down the hatch any more.

Q. Now, during all this time, was the electrical lead from the welding apparatus still—— (interrupted).

A. I broke it from the welding machine, sir.

Q. You broke it from the welding machine, but with the leads still leading down the—— (interrupted).

A. The dead lead; the dead lead.

Q. The deadman? A. Yes.

Q. When did you break it, after your third trip to the engine room?

A. Oh, yes, I broke that after—in fact, the first fire wagons may have been there before I broke that.

Q. Approximately how long, if you recall, was it before the first fire wagons got there after you had

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)
notified the gangway watch to call the fire department?

A. I wouldn't want to venture to say. It seemed like an awful long time, but it always does at a time like that.

Q. And then did you remain there throughout the period until the fire was reported out?

A. No, sir; I did not. I had men across the river and after the firemen were there and one thing or another, I went over to [30] check on that job and then I came back.

Q. Did Riley and Larson go with you?

A. I sent them back to Swan Island after the Fire Department was there for some time.

Q. I see. Now, is there anything further that you feel you would like to add or could add at this time that might help in this investigation that hasn't already been brought out by the questioning?

A. (Negative nod.)

Q. There is nothing further you have which you would care to say at this time?

A. (Negative nod.)

Q. All right, sir. Thank you very much.

Mr. Wood: Commander, I know there can't be any cross-examination here—— (interrupted).

Lt. Cmdr. Mason: We will go off the record here for a moment.

(Off-the-record discussion.)

Q. Before excusing you as a witness here, Mr.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)
Smith, handing you another piece of blank paper, would you indicate thereon, in the form of a sketch for us, exactly what these shields looked like that you used—the plywood shields in connection with safeguarding flying sparks (paper handed)?

(Sketch drawn.)

(Whereupon, the sketch above referred to was marked Coast Guard Exhibit 2.) [31]

Lt. Cmdr. Mason: Let the record show that the witness has drawn a sketch which is labeled Coast Guard Exhibit 2. Now, Mr. Smith, if you will describe that sketch in detail for us, please?

A. Now, here is a king post here—a solid stanchion.

Q. And if you will label it as such—"solid stanchion."

A. The ladder in turn fastens to that. I took one of these boards—plywood—— (interrupted).

Q. Indicating a board to the right of the stanchion.

A. Of the stanchion—to the left of the stanchion, I put a board, and this is—this is—— (interrupted).

Mr. Roberts: Port side?

A. ——port side—that, I guess is a—it was one of these—this is that case I was telling you about that stood on edge there.

Q. Cardboard carton?

A. Yes. It had cargo in there—so I slide it up in there, straightened it up in there.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)

Q. I see.

A. Then I put some one inch lumber next to this thing.

Q. Next to the boards which are athwartships behind the ladder?

A. Here—similar to this, but this here is lined up against the—— (interrupted).

Q. Now, just a moment, Mr. Smith. Don't go too fast. We have to have this described on record, so make it clear so that the [32] tape will show it. Referring to the lower right-hand corner of the Exhibit Number 2.

A. Shows the position that I had both—— (interrupted).

Q. Of the plywood—— (interrupted).

A. ——of the plywood boards—— (interrupted).

Q. ——boards, adjacent to the stanchion and behind the ladder which you were to work on?

A. That's right.

Q. I understand.

A. With this strip of wood at the bottom of both pieces on port to starboard side of the ladder and I also had one-inch standing vertical, next to the—— (interrupted).

Q. Now, the strip of wood at the bottom was merely to prevent sparks from sliding under the backing board?

A. It was an extra precaution that I used. I thought that if any sparks did go down here, they would have to go under both of them.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Lester Lawrence Smith.)

Q. I see. Which, apparently in this instance it did. A. Either that or it got in between here.

Mr. Wood: Got in what?

A. It got underneath here anyway, at least, where the burlap is.

Mr. Wood: I take it there wasn't any protection aft of this ladder?

A. There was nothing but this pad and I had about a ten foot [33] space in here (indicating).

Q. Now, one more question, Mr. Smith. You referred before to a certain number of trips you made to the engine room, and I want to clarify for the record—how many trips you did make?

A. Three trips.

Q. You did make three trips? A. Yes, sir.

Mr. Wood: Could I suggest one more inquiry? I was going to say—he tried to throw this bucket of water on the flame and for some reason he couldn't reach the flame.

A. All of the flame, sir.

Lt. Cmdr. Mason: I think he did clarify that. He said it didn't reach all of it. Some of it was spread back too far. Let the record show that the witness is excused.

(Witness excused.)

Respondent's Exhibit No. 23—(Continued)

LEO C. RILEY

was called as a witness by the United States Coast Guard, and first having been duly sworn, was examined and testified as follows:

Examined

By Lt. Cmdr. Mason:

Q. What is your full name, sir?

A. Leo C. Riley.

Q. Is that R-i-l-e-y? A. R-i-l-e-y.

Q. And what is your address, Mr. Riley? [34]

A. 2051 S. E. 141st.

Q. And your occupation, sir? A. Welder.

Q. How long have you been employed in the capacity of welding? A. With Albina?

Q. Well, what has been the extent of your welding experience?

A. I started welding in 1942.

Q. 1942 and have you been working at it steadily since that time? A. Yes, sir.

Q. And how long have you been working for Albina? A. About five years.

Q. As I understand it, you were aboard the Robert Luckenbach, the evening of 2 April, 1958?

A. Yes, sir.

Q. Approximately what time did you board the vessel? A. At six o'clock.

Q. And what was the purpose—that's six p.m.?

A. Yes, sir.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leo C. Riley.)

Q. What was the purpose of boarding?

A. We had a ladder rung to fix in the lower hold of number five.

Q. Now, to make this brief, when you speak of "we," you mean yourself, Mr. Larson and Mr. Smith? A. Yes, sir. [35]

Q. I see. And when did you first receive information that you would have this job?

A. While I was working at the yard, he come up at about 5:30.

Q. Who did? A. Mr. Smith.

Q. I see. At the Albina Yard? A. Yes, sir.

Q. And advised you that you had a job to do on the Robert Luckenbach? A. Yes, sir.

Q. Did he at that time tell you that it would be at six o'clock or did he give you any set time?

A. Well, he said as soon as the longshoremen left.

Q. And did he indicate when that would be?

A. He said six o'clock.

Q. I see, and then you came aboard at six?

A. Yes, sir.

Q. Was the welding equipment on the pier at the time you arrived?

A. No, we pushed it on the pier.

Q. You pushed it on the pier? A. Yes, sir.

Q. You brought it up with you on a truck, did you?

A. No, it was in the Luckenbach building. [36]

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leo C. Riley.)

Q. Oh, I see. Whose welding gear is that, do you know—is it yours—is it the Albina's?

A. It is Albina's.

Q. Belongs to Albina? Did you board the vessel alone or was Mr. Larson and Mr. Smith—— (interrupted). A. Mr. Larson was with me.

Q. Mr. Larson was with you? A. Yes.

Q. You both came at the same time?

A. Yes, sir.

Q. And then you pushed the welding gear out onto the pier and then what did you do next? Go aboard?

A. Well, we strung out the welding lead and went on board.

Q. I see, and then did you take the welding lead onto the ship? A. Yes, sir.

Q. And lower it down into number five hold?

A. Yes.

Q. And you already knew that this ladder rung was in number five, did you not? A. Yes, sir.

Q. Then, did you go down into the hold immediately after that? A. Yes, sir.

Q. Now, before going down into the hold, we will say between the time you boarded the ship and went down into the hold, did [37] you speak to anyone of the crew members aboard the ship, or advise anyone of the fact that you were going to start welding? A. No, sir.

Q. You did not? A. No.

Q. Do you know whether Mr. Larson did?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leo C. Riley.)

A. I don't know.

Q. All right, now, you went down into the hold and to commence the welding. Was Mr. Smith down there at this time or did he come down later?

A. He was in the hold.

Q. He was already in there? A. Yes.

Q. Was he in there when you lowered the wire down? A. Yes, sir.

Q. Who actually lowered it—you or Mr. Larson?

A. Mr. Larson.

Q. I see, and you were standing by him, were you, at the time?

A. Well, I was pulling one end while he lowered it into the hold.

Q. I see, and then you both went down into the hold? A. Yes, sir.

Q. Did you have any safety apparatus with you?

A. Just a bucket of water. [38]

Q. Bucket of water. Had you taken that down, or was it already there?

A. Yes, it was there.

Q. It was there already? A. Yes.

Q. Where was that situated?

A. It was right alongside of where we was going to work.

Q. I see. Now, the area where you were going to work—was it bare to the deck? A. Yes, sir.

Q. And there was cargo though, on each side, is that correct? A. Fore and aft.

Q. Or fore and aft? A. Yes.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leo C. Riley.)

Q. And was the deck bare to the skin of the ship? A. Yes, sir.

Q. All the way across to the skin of the ship?

A. Yes, sir.

Q. And then did you make any preparations then?

A. Well, Mr. Smith had put up a bulkhead—plywood bulkhead.

Q. Was this already up when you and Mr. Larson came? A. Yes, sir.

Q. It was? A. Yes.

Q. And what specifically was your job to be on this—— (interrupted). [39]

A. Well, I was the fitter on this job. I was supposed to put this ladder rung in.

Q. And did you have the ladder rung with you?

A. Yes, sir.

Q. And did you fit it or did Mr. Smith fit it?

A. Well, Mr. Smith held it up there.

Q. And then who handled the torch or the cut of the electric—— (interrupted).

A. Mr. Larson was the welder.

Q. He was the welder. And what did you do specifically, if anything?

A. Well, I was just standing by mostly.

Q. Standing by. I see. Is it a general practice for three men to go out on a job of this type?

A. It is at times.

Q. Was there a particular purpose for all three

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leo C. Riley.)
of you being there on this particular occasion, do you know?

A. Well, I think that the main purpose was because it was in such a hurry.

Q. It was in such a—how do you know it was—— (interrupted).

A. Well, because the longshoremen were coming right back to work and they won't go in without the ladder rung being fixed.

Q. I see. In other words, the longshoremen—it is your understanding they would refuse to work unless all the ladder rungs were in place? [40]

A. Yes.

Q. I see. How did you happen to get this information?

A. Oh, this has been standing information for a long time.

Q. Now, while standing by, you undoubtedly had a good view of exactly what happened, did you not?

A. Yes, sir.

Q. Well, suppose you explain then in your own words just what did happen as you saw it?

A. Well, there was a little gob of weld where the old ladder rung was and I asked the welder to burn off this little gob. So he—— (interrupted).

Q. That would be Larson?

A. Yes, sir. He struck the arc and of course, the sparks fell down on the deck and it bounced underneath the bulkhead or they rolled underneath, and we couldn't get at it to get it out.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leo C. Riley.)

Q. Now, would that be underneath the bulkhead forward from where—— (interrupted).

A. Forward, yes, sir.

Q. ——the welding was going on?

A. Yes. And then I climbed up on deck to get the fire hose and there was no water on the ship.

Q. Oh, you mean you climbed up on deck to get a fire hose just because the spark went under the bulkhead?

A. Oh, no, sir, it was starting to go. I mean, there is no stopping that piece of hemp once it starts burning. [41]

Q. It started to flame instantly, did it?

A. Yes, sir.

Q. I see, and did you see the flame?

A. No, I didn't see the flame, but they yelled for the fire hose, so I was going up after it right quick.

Q. Who is "they"?

A. Mr. Smith and Mr. Larson.

Q. They both yelled for a fire hose?

A. Yes, sir.

Q. So then you went up on deck to get a fire hose? A. Yes.

Q. And what did you do when you got up on deck?

A. Well, I grabbed the fire hose and started off to the hold with it.

Q. Where was the fire hose situated?

A. It was at the forward end of number five hatch.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leo C. Riley.)

Q. Up on a rack? A. Yes, sir.

Q. On the bulkhead?

A. Yes. Up on the deckhouse.

Q. I see. A. Masthouse.

Q. Did you pass it down into the hold?

A. Yes, sir.

Q. And what did you do then? [42]

A. Well, I turned the water on.

Q. And was there any water?

A. No, sir, there wasn't.

Q. There was no water? A. No water.

Q. What did you do then?

A. Well, they called the Fire Department.

Q. Who? A. Mr. Smith.

Q. Well, now, you have got Mr. Smith down in the hold.

A. Well, he came up right behind me, too.

Q. I see, and then did he go ashore and call the Fire Department? A. I don't know.

Q. I see, but as far as you know, the Fire Department was called—— (interrupted).

A. Yes.

Q. ——and you believe Mr. Smith had something to do with it? A. Yes.

Q. Is that correct? And what did you do in the meantime?

A. Well, just stood by, that's all we could do.

Q. Did you yell "fire" to anyone?

A. No, sir.

Q. Was there anyone about the decks that you

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leo C. Riley.)

saw? A. Not at that time, no. [43]

Q. How about the gangway watch, did you see—— (interrupted).

A. Well, he was at the gangway.

Q. You did see him? A. Yes, sir.

Q. Did you call to him? A. Yes, sir.

Q. What did you say to him?

A. Just asked him—told him that there was a fire.

Q. And then you stood about the deck and waited and what happened after that?

A. Well, after that, we could only wait and hoped that the Fire Department got there in time to put it out.

Q. Did Mr. Smith stand there and wait with you or was he gone someplace else?

A. Well, he was trying to get the pump in the engine room to get some water. He would run down into the engine room then.

Q. I see. Where was Mr. Larson in the meantime?

A. Well, he was down in the hold with his hands on the fire hose.

Q. I see. Was smoke coming up out of the hatch by this time? A. Yes, sir.

Q. Fairly heavy?

A. Oh, not too heavy at that time, but it was coming up.

Q. I see. Did you look down?

A. Yes, sir. [44]

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leo C. Riley.)

Q. Could you see flames at this time?

A. No.

Q. It was all strictly smoke? A. Yes, sir.

Q. Could you see Mr. Larson? A. Yes, sir.

Q. You could see him? A. Yes.

Q. Then what happened next? Did the Fire Department come? A. Yes, sir.

Q. Now, before the Fire Department came, did you hear the ship's alarm go off?

A. No, I certainly didn't.

Q. You did not? A. No.

Q. How long would you say it was before the Fire Department arrived?

A. Oh, I don't know. I wasn't keeping track of the time at that time.

Q. Half an hour? Thirty seconds? You can gauge approximately. A. Oh, fifteen minutes.

Q. Approximately fifteen minutes from the time you came out of the hatch?

A. Yes, sir; yes, sir.

Q. I see, and did you at any time hear the ship's alarm go [45] off? A. No, sir, I didn't.

Q. You didn't. Did you see Mr. Smith again?

A. Yes, sir.

Q. Was this after the Fire Department arrived?

A. Yes.

Q. It was, and where did you see him?

A. He was on deck, at that time.

Q. Back aft by number five? A. Yes, sir.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leo C. Riley.)

Q. Did Larson remain down in the hold until the Fire Department arrived?

A. No, sir, he came up before the Fire Department got there.

Q. He did and did you leave the hose down in there? A. Yes, sir.

Q. Did any other members of the ship's force arrive at the scene, do you know?

A. Well, they were around on deck—— (interrupted).

Q. They were?

A. ——at that time and they lifted the hatch cover off.

Q. I see. Did you recognize them as being members of the crew?

A. Well, yes, the engineer or something, I don't know who he was, but he was there.

Q. Was there anyone there in an officer's uniform? [46] A. Yes, sir.

Q. There was?

A. He told me that they had a section pipe out of the engine room.

Q. I see. The section of pipe out, so that was why the water couldn't be brought up to the fire hydrant? A. Yes, sir.

Q. Had you specifically asked him why there wasn't any water or—is that why he came out with this?

A. No, he volunteered the information when I said there was no water.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leo C. Riley.)

Q. I see, and what was he doing in the meantime, if anything? A. Well, nothing.

Q. Now, did you remain aboard after the Fire Department came? A. Yes, sir.

Q. For how long?

A. Oh, I think about a half hour.

Q. Was the fire out when you finally left?

A. No, sir, it wasn't.

Q. And as I understand it from Mr. Smith, he finally told you to go back to the yard, was it?

A. To go to Swan Island.

Q. Go to Swan Island? A. Yes, sir.

Q. And then you left? [47] A. Yes.

Q. And Mr. Larson left with you, did he?

A. Yes, sir.

Q. While you were up on deck and before the Fire Department arrived, did you observe anyone taking any action toward extinguishing the blaze?

A. No, sir, nothing could be done at that time. We had no water.

Q. In other words, no one had started a bucket brigade of anything like that—— (interrupted).

A. Oh, no, sir.

Q. ——to your knowledge, anyway?

A. No.

Q. And you say that you at no time heard the ship's general alarm? A. No, sir, I didn't.

Q. Did there appear to be a lot of noise about the decks? A. Well, no more than usual.

Q. What I am trying to get at is whether or not

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leo C. Riley.)

a general alarm might have gone—sounded, and through the excitement or accompanying noise, you might possibly have just overlooked hearing it?

A. Well, sir, I don't know about that, but there was not too much noise. I mean, other than the men talking.

Q. I see. Is there anything further that you would care to add or you feel may throw light on this investigation which hasn't [48] been brought out by my questioning, Mr. Riley?

A. I don't think so, sir.

Q. Nothing at all that you feel might prove pertinent in this investigation?

A. No, sir, I don't think so.

Q. Are you a certificated welder?

A. Well, I was certified in the Vancouver Shipyards.

Q. Now, when you go out on these particular welding jobs, is it a—is there any form of general practice that you conform to for safety's sake, when you have to weld in cargo holds?

A. Well, we usually have a fire extinguisher or water in the holds.

Q. Like you did in this instance—— (interrupted). A. Yes, sir.

Q. ——a bucket? But is it a practice say for you to insist upon the ship's force rigging a fire hose in advance and having pressure to the nozzle?

A. No, sir.

Q. Pressure to the hydrant?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leo C. Riley.)

A. Not to my knowledge it isn't.

Q. There weren't any hand extinguishers nearby at hand, were there? A. No, sir.

Q. Have you ever been given any specific instructions by your employers relative to what you will do and what you will not do [49] with regard to safety against fire?

A. Well, they ask us to have a fire extinguisher; that's about all.

Q. They ask you to have a fire extinguisher?

A. Yes, sir.

Q. Or did they direct that you shall have a fire extinguisher?

A. Well, we should have one, yes.

Q. Then this bucket, I take it, in this particular instance, was to be a substitute for the fire extinguisher? A. Yes, sir.

Q. Are there—did you get those instructions with regards to having a fire extinguisher verbally or is there something in writing that you know of?

A. Not that I know of.

Q. I see—strictly verbal instructions furnished all welders?

A. Well, it is for everybody working on the waterfront, yes.

Q. I see. I have no further questions, Mr. Riley, and I want to thank you at this time for your appearance here.

(Witness excused.)

Respondent's Exhibit No. 23—(Continued)

(Whereupon, at 2:25 o'clock p.m., a recess was taken until 2:30 o'clock p.m., at which time the investigation reconvened, with the same parties heretofore mentioned being present.)

LEONARD LARSON

was called as a witness by the United States Coast Guard, and having first been duly sworn, was examined and testified as follows: [50]

Examined

By Lt. Cmdr. Mason:

Q. Would you state your full name and address, sir?

A. My name is Leonard Larson; 903 West 44th, Vancouver, Washington.

Q. Mr. Larson, is that L-a-r-s-o-n?

A. That's right.

Q. And what is your occupation, sir?

A. Welder.

Q. Are you a certified welder, sir?

A. Yes.

Q. And how long have you been employed in that occupation?

A. Since 19—I first started welding in 1930—acetylene welding.

Q. And as I understand it, you are presently employed by Albina? A. That's right.

Q. How long have you been employed by that firm, sir?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leonard Larson.)

A. I started to work for Albina in October the 15th, 1951.

Q. Approximately seven years? A. Yes.

Q. And is—does this work that you do involve frequent visits to merchant vessels for the purpose of welding? A. Yes, it does.

Q. As I understand it, you were employed on a welding task aboard the Robert Luckenbach, last night, the evening of 2 [51] April, 1958, is that correct, sir? A. That's right.

Q. When did you first board the ship, Mr. Larson? A. At about 6:30—between 6, 6:30.

Q. Between 6 and 6:30? A. Yes.

Q. What was your purpose of boarding?

A. We were repairing a ladder rung, number five hold.

Q. And how did you first receive the information regarding this job?

A. From the foreman, Lester Smith.

Q. And you are a member of some union, are you, Mr. Larson? A. Seventy-two—Local 72.

Q. That is of what, sir?

A. Boilermakers' Union.

Q. I see. Is Mr. Smith and Mr. Riley both members of the same Union? A. That's right; yes.

Q. Now, had Mr. Smith given you any specific instructions regarding this particular job? As to any particular time to be aboard, or?

A. He contacted me down at the Company's plant and told us what he wanted done and what

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leonard Larson.)
he wanted done on the—he wanted us to pull a—string a lead out to number five hold.

Q. To string a lead out? A. Yes. [52]

Q. In other words, a welding lead to number five hold? A. Yes.

Q. And what else? Anything else?

A. No, that's all he said at the present.

Q. Did he give you any particular time as to when to do this? A. To what?

Q. Any particular time to be aboard to do this?

A. No, he didn't, no.

Q. He didn't specify a time? A. No.

Q. Now, what time was this that he gave you these instructions?

A. It was, I would say, around 6—between 6 and 6:30.

Q. You stated this was while you were down at your plant? A. Yes.

Q. At Swan Island? A. Yes.

Q. And then what did you do then?

A. We—I got my car and went down to the Luckenbach Dock.

Q. In your own car? A. Yes.

Q. I see, and what did you do after you arrived at the dock?

A. I put my stuff aboard and got a welding—a portable welding machine backed up as close as I could to the ship.

Q. Was this welding machine in the shed at the time you arrived? [53]

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leonard Larson.)

A. Yes, it was; yes, it was.

Q. I see, and then you backed it up to the pier edge? A. That's right.

Q. And Mr. Riley assisted you in this, did he?

A. Yes. And Smith, too.

Q. And Mr. Smith, too? A. Yes.

Q. And then you went aboard and went down into the hold, did you? A. That's right.

Q. And did you have the lead already down in before you went into the hold?

A. Yes, we always put the lead in before we went into the hold.

Q. And then was Mr. Smith already in the hold when you got there? A. He was, yes.

Q. He was. When you got down there, did you make any preliminary preparations with respect to fire prevention?

A. Well, we had water there, yes.

Q. You did have water? A. Yes.

Q. When you say that, what do you mean—a hose? A. No, we had a bucket of water.

Q. Approximately how large was this [54] bucket?

A. Oh, I would say it would hold five gallons—four or five gallons.

Q. Four or five gallons, and was it full, do you know? A. Yes, it was.

Q. So you did have, actually, four to five gallons of water on hand? A. Yes.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leonard Larson.)

Q. Did you make any other preparations then, there?

A. Yes, we did. He had a piece of plywood there for fire protection.

Q. When you say "he," Mr. Smith—— (interrupted). A. Yes.

Q. ——already had this up? A. Yes.

Q. Now, as I understand it from previous testimony, Mr. Smith had rigged a piece of plywood athwartships, in other words, across, side to side, behind the ladder rung that you were to weld, is that correct? A. That's right; that's correct.

Q. And then he placed two other partitions facing aft on each edge of this piece of plywood, is that correct? A. That's right.

Q. Was that plywood also or was it cardboard, do you know? A. It was plywood.

Q. Plywood? [55] A. Plywood.

Q. Then as I understand it, down on the landing pad itself, which I understand to be directly below the ladder, he had also placed a couple of strips of—of wood on each side also, as an added precaution to prevent sparks from going under the plywood, is that right? A. That's right, yes.

Q. Do you know what size lumber this was that he used, or approximately?

A. Well, I would say it was—about twelve-inch boards.

Q. Twelve-inch boards?

A. Eight to twelve-inch boards.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leonard Larson.)

Q. Would they be the three-quarter inch thickness by twelve-inch width?

A. Yes, somewhere along in there.

Q. I see. Now, in the meantime, did you hook up your welding gear? A. I did, yes.

Q. And as I understand it, you were the one that was going to do the actual welding, is that correct? A. That's correct, yes.

Q. Mr. Smith—did he place the other rung in place for you to start welding?

A. Yes, he did; yes.

Q. Did he? [56]

A. The welding machine wasn't working to start with and Riley went out of the hold and then come back down again, and then we started to work.

Q. What did he go out of the hold for, to fix the welding machine? A. Yes.

Q. Now, what did you do first?

A. We—what I done first was—we were in—I held—Mr. Smith held the rung up there in place and I was trying to weld it. Just struck an arc; just started.

Q. Now, was it your intention, when he held that rung up there to actually tack the rung to it or were you about first to burn off the old weld?

A. I was just—I was just going to burn off a little spot on the old weld and he set it in there—set it in there and I was going to tack it—tack it in.

Q. Then he set it in and you were about to tack it in and what happened then?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leonard Larson.)

A. The fire caught.

Q. The fire caught? How do you know the fire caught? You had your mask on, didn't you?

A. I had my mask on, but he hollered at me.

Q. Oh, he hollered at you? What did he say?

A. He said, "Hold her," and that's all. I looked down there and saw the fire. [57]

Q. Now, when you looked down, where did you see the fire? In front of you—right on your side of the partition? A. Yes, it was.

Q. That there was a fire right there?

A. Yes.

Q. Did you or Mr. Smith or Mr. Riley pull the partition away to see if there was any fire behind it?

A. We pulled the partition away and throwed the water right on it as fast as we could.

Q. Who threw the water?

A. Mr. Smith threw the water.

Q. Mr. Smith threw the water? A. Yes.

Q. And did that tend to extinguish the flame at all?

A. It did, but it was—got too far under.

Q. Did the flames seem to move rapidly—did you observe it to move? A. Yes.

Q. It did? A. Yes.

Q. What happened next?

A. Well, they run up and got a—to get a fire hose out and then I stayed down there and tried to beat the fire out, but it just got away. I couldn't—

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leonard Larson.)
if I could have got—had water in the line, I could have got it. [58]

Q. What were you trying to beat it out with?

A. I was trying to put it out with my hand.

Q. I see. In other words, pulling the portions of burning matter out? A. Yes.

Q. Did you burn yourself as a result of that?

A. No, I didn't; no.

Q. Did you have your welder's gloves on?

A. I did, yes.

Q. And approximately how long were you down in the hold, Mr. Larson?

A. Not over—not over fifteen minutes.

Q. I see, and during that time, did anyone else come down again, or were you down there during that time alone?

A. I was down there during that time alone, yes.

Q. Now, did the Fire Department arrive before you came out of the hold?

A. No, they arrived after I got out of the hold.

Q. All right, now, what made you come up and out of the hold?

A. Because the smoke was getting too thick.

Q. Getting too thick? A. Yes.

Q. Now, by the time you got out of the hatch, the smoke—was it billowing out fairly thick?

A. Yes; yes, it was. [59]

Q. At any time did you hear the ship's fire alarm sound—the general alarm system?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leonard Larson.)

A. No, I didn't. I probably wouldn't have been in a position to hear it anyway.

Q. I see. You mean being down in the hold?

A. Yes; yes.

Q. And when you came up topside, what did you do then?

A. I—well, there was nothing I could do—there was nothing I could do.

Q. Well, was your hot lead still down in the hold? A. The which?

Q. The hot leads in the welder?

A. The lead was in the lower hold and my hood was in there, too.

Q. Did anyone disconnect that lead, do you know?

A. Yes, they did. The lead was disconnected at the machine.

Q. I see. Do you know who did it?

A. I don't know who did it, no.

Q. And what did you do then, if anything? Did you just stand by the hold?

A. I stood by the hold, yes.

Q. When you came out of the hold, was there considerable activity about the deck?

A. Yes, there was, and the Fire Department was just arriving.

Q. Was just arriving? A. Yes. [60]

Q. Now, when you first came out of the hold, did you notice whether any of the ship's fire hoses

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leonard Larson.)
were strung out, other than the one that had been sent down to you?

A. There was—I would say there was one more.

Q. One more? A. Yes.

Q. Where did that come from?

A. It come from the forward end.

Q. From somewhere forward of the ship?

A. Yes.

Q. Did it come down the port or starboard side?

A. What?

Q. Did it come down the port or starboard side?

A. It come down—I think it come down the starboard side.

Q. The outboard side then. The ship was moored, as I understand it, port side to? A. Yes.

Q. So the other hose came down the starboard side? A. Yes.

Q. Was that hose let out into the—let down into the hold also, do you know?

A. No, I don't think so; no.

Q. And when the Fire Department came, did you remain aboard the ship?

A. I did, yes. [61]

Q. For how long?

A. Oh, for approximately ten minutes—ten or fifteen minutes.

Q. And then what did you do?

A. Went—left for Swan Island.

Q. I see. Did you go in company with any of the other men? A. Went with Riley—Leo Riley.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leonard Larson.)

Q. Leo Riley?

A. Yes. He drove his car and I drove mine.

Q. Now, when you first came aboard the ship, prior to this incident, did you speak with anyone aboard—any of the crew members or anyone in regards to this welding job that you were going to do?

A. No, I didn't; no.

Q. Do you know whether Mr. Smith or Mr. Riley did?

A. Well, I don't know if they did or not.

Q. I see. Do you know whether anyone in the ship's force was aware that this welding was going to be done?

A. I wouldn't know that either; I wouldn't know.

Q. I see. Now, as I understand it, the ladder rung has still not been installed, is that right?

A. Yes, that's right.

Q. To your knowledge, it has not?

A. It has not, no.

Q. Where is the particular rung that you were going to put in, do you know? [62]

A. It was on the forward ladder, about the third rung up. Second or third rung up.

Q. Where the missing rung is? A. Yes.

Q. Would that be even to approximately your chest level—perhaps four feet above the landing pad?

A. Somewheres along approximately about that.

Q. Have you been advised of the position of this particular missing rung before you went to the ship

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leonard Larson.)

on the job? A. No, I wouldn't; no.

Q. You didn't find out until after you got there?

A. No.

Q. And then Mr. Smith pointed it out to you, did he?

A. He—Mr. Leo Riley was to do the fitting. He told him about it. All my job was to do the welding, was all.

Q. Now, when you went down into number five, did you observe what the cargo was down there?

A. Yes, I did.

Q. What was it?

A. It was paper—rolls of paper, from what I could judge.

Q. Was that all?

A. No, there was some—the cargo next to the—between the ladder and the bulkhead.

Q. What did that appear to be, or did you notice?

A. I thought it was hemp or oakum, but I didn't know—somebody [63] said it was burlap, I didn't know.

Q. You didn't know yourself? A. No.

Q. Was it this particular cargo that seemed to flare up rapidly—where the flames spread rapidly?

A. Yes.

Q. It was? A. Yes.

Mr. Wood: Commander, by "this particular cargo," you refer to the burlap and not the paper,

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leonard Larson.)

is that it? When you say "this particular cargo"—I just wondered which was which?

Lt. Cmdr. Mason: Yes, when I say "this particular cargo," I was referring—you don't have to get this—I was referring to the cargo that he said he thought was oakum or something that someone had told him might be burlap.

Mr. Wood: I would like to ask you to ask him if that was the cargo where the flame started.

Lt. Cmdr. Mason: I did already. And he said "yes." In other words, what it amounts to is it was the burlap but he doesn't know it was burlap.

Q. In your experience as a welder, Mr. Larson, have you ever encountered a situation such as this before, where a fire has occurred while you were in the process of welding?

A. No, not to my knowledge, I haven't; no.

Q. This is your first experience of a casualty of this nature? [64] A. Yes.

Q. Have you ever had any general practice or policy that you, yourself have followed with relation to safety practice in the prevention of fires when you are in cargo holds welding?

A. Yes, I have; yes.

Q. What normally is your practice?

A. Well, we usually use water or anything that we can—that we can—make it as safe as we possibly can.

Q. You mean keeping water on hand for an emergency? A. Yes.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leonard Larson.)

Q. Are there any instructions that you have ever been issued by your company with respect to maintaining any fire prevention equipment on hand?

A. Yes, there has been; yes.

Q. What, specifically have you been instructed to do?

A. Either pull out—put out—pull out a fire line or use a CO_2 bottle, or something like that.

Q. In other words, to keep some fire-fighting apparatus on hand in readiness, is that it?

A. Yes, that's right.

Q. Are these written instructions or are they verbal? A. Verbal instructions.

Q. Verbal instructions. Do you have anything in writing at all? A. No; no. [65]

Q. Now, as a certified welder, are you required by law or by any local harbor rules that you know of, to report this welding to the vessel before commencing the work? A. No, not that I know of.

Q. Not that you know of in either event?

A. No.

Q. Now, in your opinion, do you feel that this fire was actually started by the sparks resulting from the welding that you had started? You feel that this actually did start the fire?

A. Yes, I do.

Q. When you were standing on the landing pad, did you observe whether or not it was clear of all matter and clean and dry? A. Yes, it was.

Q. It was? A. Yes.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Leonard Larson.)

Q. There weren't, as far as you observed, any pieces of cardboard boxes or cardboard sheets of any kind over that? A. No, there wasn't.

Q. No debris? A. No.

Q. And no dunnage—pieces of dunnage over the landing pad itself? A. No.

Q. Was the landing pad dry? I mean there was no oil—— (interrupted). [66]

A. No, oil; no, no.

Q. Was there any odor of oil that you observed?

A. No; not that I observed; no.

Q. And as I understand it, you were not injured as a result of this casualty? A. No; no.

Q. Now, irrespective of the questioning that I have just propounded here, Mr. Larson, do you have anything further that you feel should be added that would be pertinent to this investigation or anything at all that you would care to say?

A. Nothing that I would care to add to it, no.

Lt. Cmdr. Mason: All right, sir. I have no further questions and I want to thank you for appearing here today.

(Witness excused.)

RICHARD BAILEY

was called as a witness by the United States Coast Guard, and first having been duly sworn, was examined and testified as follows:

Examined

By Lt. Cmdr. Mason:

Q. What is your full name and address, sir?

A. My name is Richard Bailey, 1907 N. E. 32nd Avenue.

Q. And how are you employed, Mr. Bailey?

A. I am a superintendent with Albina Engine and Machine.

Q. How long have you been employed by Albina?

A. Sixteen years. [67]

Q. Now, when you speak of superintendent, what specifically does that position entail? In other words, what are the functions or duties that you must perform?

A. Well, I am in charge of the repair work that we do away from the drydocks.

Q. And that would include such things as repair of vessels upon receipt of a job order at other piers?

A. That's correct.

Q. Now, you are familiar with the fire that occurred aboard the Robert Luckenbach at Luckenbach Terminal last night on 2 April, 1958?

A. Yes.

Q. When did this fire first come to your attention? A. Shortly after 6 o'clock.

Q. Were you aboard the vessel at the time?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard Bailey.)

A. No, sir.

Q. Where were you? A. At home.

Q. Now, did you then proceed down to the vessel?

A. Yes, sir.

Q. And approximately what time did you arrive?

A. 6:30, approximately.

Q. Was there any unusual activity going on aboard at this time?

A. The firemen were aboard at this time. At the time I got there. [68]

Q. How did you first become aware of the fire?

A. Les Smith called me.

Q. I see. And what did he tell you when he called?

A. The Robert Luckenbach was afire in number five hold.

Q. Did he explain anything as to probable cause?

A. No.

Q. Well, why would that bring you down to the ship then?

A. We were working in number five hold.

Q. I see. So in other words, you associated the fact that you had men working in number five hold, the fact there was a fire there, so you felt that—— (interrupted). A. Yes, sir.

Q. ——it was your duty to appear. And you say when you arrived there, the firemen—the Fire Department was already there? A. Yes.

Q. Did they have water running into the hold at this time, do you recall?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard Bailey.)

A. Yes, sir, they did.

Q. Now, coming back to the fact that these men, Mr. Smith, Mr. Riley and Mr. Larson, the previous witnesses, were aboard the ship for the purpose of a welding repair job, can you explain for me exactly how this came to be? In other words, where did the order first originate from—for the repair?

A. Well, Mr. Sterling (phonetic) of the Luckenbach Steamship [69] Company asked us to repair or to replace one broken—or one missing ladder rung in number five lower hold.

Q. Did he contact you personally in regards to this?

A. He contacted Mr. Brewer (phonetic). I was on the Afoundria in the morning, and he contacted Mr. Brewer.

Q. Mr. Brewer is who?

A. He is the repair superintendent at Swan Island.

Q. For Albina? A. For Albina, yes.

Q. And Mr. Brewer contacted you, did he?

A. Yes, sir.

Q. About what time would that have been?

A. Prior to noon.

Q. Prior to noon. Were you aboard the Afoundria at this time?

A. No, I had made arrangements with Mr. Brewer to look in on the Luckenbach, because both ships arrived early on yesterday morning and I couldn't be at both places; which is quite common.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard Bailey.)

I met him then on the Luckenbach, at about eleven o'clock, or at that time before noon.

Q. I see. On board the Luckenbach itself?

A. Yes.

Q. And he gave you verbal instructions to replace a missing ladder rung in number five hold?

A. That's correct.

Q. And did you receive any written job order in this connection? [70]

A. No, sir. From Luckenbach Steamship Company you mean?

Q. Well, either from him or from Mr. Sterling or from anyone?

A. Not in connection with this ladder rung, no.

Q. I see. Is it a general practice that you normally receive a job order yourself—that is, in writing, or is it more common that you are given verbal instructions?

A. More common that they are verbal.

Q. Speaking of minor repairs such as this replacing of a ladder rung?

A. That's right, they commonly are verbal.

Q. All right, now, as we picture it, Mr. Sterling has given you verbal instructions—or Mr. Brewer has given you verbal instructions to install this ladder rung in number five—is that correct?

A. That's correct.

Q. And did he describe just where it was located? Or did you go down and look?

A. We—both of us went and looked.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard Bailey.)

Q. Mr. Brewer and yourself—— (interrupted).

A. Mr. Sterling—— (interrupted).

Q. And Mr. Sterling? A. Yes, sir.

Q. You actually went down in the hold?

A. No, sir. We went to the after end of the number five hatch and looked over the coaming. They were discharging cargo [71] at that time.

Q. Now, was any comment made to you at this time that the missing rung would be clear of cargo to permit the welding? A. Yes, sir.

Q. Who told you this, Mr. Sterling?

A. I don't remember.

Q. Did they ask you to perform this job at any particular time? A. Yes, sir.

Q. What time? A. Between 6 and 7.

Q. They asked you to perform it—was this Mr. Brewer that said this or Mr. Sterling?

A. No, Mr. Brewer is now out of this.

Q. Oh, I see.

A. I mean I—this is my job now.

Q. So Mr. Sterling is the one that asked that it be done between 6 and 7? A. Yes.

Q. Did he explain why he wanted it done at that particular time?

A. This is the time between the day longshoremen and the night longshoremen, there is an hour free—— (interrupted).

Q. Yes, I understand that, but I mean, did he explain this to you or were you just aware of it?

A. It is customary—I was aware of it. [72]

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard Bailey.)

Q. You were aware of it through past custom?

A. That's right.

Q. Now, was there anyone else present at the time Mr. Sterling requested that this job be done?

A. I don't believe so; but I don't remember for sure.

Q. Do you recall whether you brought it to the attention of any member of the ship's force that you would accomplish this job? A. Yes, sir.

Q. Who did you notify?

A. We questioned the Chief Mate about this job. There was some question about which ladder the rung was in.

Q. And you asked the Chief Mate to point it out to you or just that he describe it?

A. The job was to be in the after ladder in number five lower hold, and from the hatch coaming, there was no apparent damage to the rung. And then, we—Mr. Sterling and myself and Mr. Brewer and the Chief Mate, to make sure that he intended it to be the after ladder—the cargo was up partially on the after ladder—we couldn't see the entire ladder at that time, and we wanted to make sure that that was the ladder he was talking about.

Q. So all three of you actually went to see—— (interrupted).

A. We—in a group, that's right.

Q. And then did he take you down to show [73] you?

A. No, he confirmed that it was the after ladder that the rung was on, yes.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard Bailey.)

Q. That it was the after ladder. Did you at this time advise him as to what time you would be aboard to make the repair?

A. I didn't personally. I think he was aware that it would be between 6 and 7. I am not sure of that.

Q. You are not positive that he knew that the repairs would be made at that time?

A. No, sir.

Q. Then what did you do after that? Did you contact Mr. Smith or—— (interrupted).

A. Yes, we had no other work on the ship that could be accomplished during the day shift other than the generator job that was going on and left the ship, went back to the Afoundria, and Mr. Smith comes to work at 3 o'clock, the day shift foreman notified him of the job.

Q. At Albina?

A. Yes, sir. I notified the day shift foreman who Mr. Smith works for directly and—— (interrupted).

Q. And then as far as you know, he notified Mr. Smith? A. That's correct.

Q. So you didn't actually have any direct communication with Mr. Smith at all about this particular job?

A. No; until on my way home, I happened to bump into him when he was just going to the [74] ship.

Q. I see. Did you—— (interrupted).

A. I asked him where he was going and he said

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard Bailey.)

he was going to the Luckenbach for the ladder rung. This was some time—maybe 5:30.

Q. I see. Now, what I am trying to—or have been trying to ascertain here, Mr. Bailey, is whether or not you specifically brought to the attention of any member of the ship's force, the fact that welding would be accomplished between 6 and 7 in number five hold? A. No, sir.

Q. You didn't specifically notify anyone?

A. No, I didn't specifically notify them.

Q. Now, you stated that you got down to the ship at about 6:30 and the firemen were already there? A. Yes, sir.

Q. And I believe you stated that water was placed on the fire just shortly thereafter?

A. I believe at the time I came aboard, water was going into the hold.

Q. I see. And then what did you do, did you board the vessel? A. Yes, I did.

Q. And did you—— (interrupted).

A. I walked up as far as the hatch coaming. I was just in the way.

Q. I see. Was Smith, Riley or Larson there at that time? [75] A. Smith was there.

Q. And how about Riley and Larson, had they already left? A. They had already departed.

Q. And then did you discuss the situation with Smith? A. Yes.

Q. And Mr. Smith related to you the fact that

(Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard Bailey.)
a fire had started as the result of a welding spark, did he? A. Yes.

Q. And did you have any further discussion with any of the ship's force?

A. No, sir; I didn't notice any of the ship's force that I recognized as of the ship's force. Mr. Radovich of Luckenbach's Dock—superintendent, I believe, or cargo superintendent, I am acquainted with and I—— (unfinished answer).

Q. Now, to your knowledge, was this particular job—referring to the replacement of the missing ladder rung—— (interrupted). A. Yes.

Q. ——on any kind of a written job order received by Albina—to your knowledge?

A. To my knowledge it wasn't.

Q. It wasn't? A. No.

Q. I see. It was just a—being a small job, it was in addition to possibly other repairs? [76]

A. Yes, sir.

Q. Were there other repairs—— (interrupted).

A. Yes, sir.

Q. ——that you had to do on the Robert Luckenbach? A. Yes, sir; there were.

Q. There were? A. Yes.

Q. What were those other repairs, just specifically—were they hull or engine?

A. There was one big job in each department—a generator in the engine room and the construction of a bolted false deck in number two 'tween decks for hull.

(Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard Bailey.)

Q. I see, and then as I understand it, the first time you even heard about any job with reference to restoring the ladder rung was about at 11 o'clock that morning? A. Yes, sir.

Q. It was brought to your attention. Now, coming to a little bit different matter, Mr. Bailey—are there any instructions issued by yourself or by any higher authority with Albina—welders—relative to any safety precautions that shall be carried out while welding or when welding operations are going to be performed? A. Yes, sir; there are.

Q. Are they in writing or verbal or both?

A. As far as I know, they are verbal and of quite long [77] standing.

Q. And what specifically are these instructions?

A. Well, it is against our rules to either weld or burn on any bulkhead without viewing the other side of the bulkhead—this is very important; and it's—we have rules with regard to welding against tanks; in any hazardous situation, that there is no welder or burner alone any place without somebody there to help protect against fire. These are the things that you have in mind and they—— (interrupted).

Q. Yes. Now, why in particular were there three men sent on this specific job? In other words, as I understand it, only there is a welder and then a fitter or a man who stands by?

A. That's correct.

Q. But in this case, there were three, one being

(Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard Bailey.)
of course the foreman. Was that really because Mr. Smith was a foreman and would oversee the task?

A. Well, no; if we had many jobs on the ships—on the ship and lots of men, certainly not the foreman of the entire night shift would have been there to see one ladder rung installed. It is a very minor job, but he was there specifically because we realize there is a fire hazard in working in cargo holds.

Q. You did definitely realize there was a fire hazard. Had you discussed this with Mr. Smith?

A. No. Not at this time. This is—— (unfinished answer).

Q. Had you discussed the subject of there being a possible [78] hazard or an existing hazard with Mr. Sterling or Mr. Brewer earlier when you had discussed this task?

A. No, sir; I don't believe so.

Q. You did, however, when you looked down the hatch, observe the cargo that was down there?

A. Well, we were looking at the after ladder. The rung turned out to be on the forward ladder.

Q. At this time when you were looking at the after ladder, did you observe what the cargo was down there?

A. That was conduit and it was all to be discharged prior to the time we were going to—— (interrupted).

Q. So in other words then, it was your assumption that the welding was going to be accomplished in the vicinity of conduit?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard Bailey.)

A. In the vicnity of no cargo. This cargo was all supposed to be discharged—— (interrupted).

Q. Before 6 o'clock?

A. ——before 6 o'clock and it was.

Q. Maybe I am misunderstanding you here.

A. At the after ladder—this is the ladder.

Q. Oh, at the after ladder, I see.

A. Yes.

Q. But then of course, it turned out that it was the forward ladder that was involved—— (interrupted). A. Yes, sir.

Q. ——and you found this out when you, in company with [79] Mr. Sterling and Mr. Brewer saw the Chief Mate regarding this?

A. No, not at that time. He still felt that it was the after ladder. They notified us by telephone about 4 o'clock that it was on the forward ladder.

Q. I see. Was any discussion held then with regard to what the cargo situation was then at the forward ladder? A. No, sir.

Q. Getting back to these instructions of long standing that you spoke of with respect to safety against hazards during welding operations, are there any practices by the—that you have the men observe or any policies established by the company that you are aware of, requiring the presence of water on hand or a fire extinguisher or anything specific along that line?

A. Yes, we never let a welder go into a hazardous place without some means of combatting fire.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard Bailey.)

Q. And is that the way the instructions are, that he will never go in without some means of combatting the fire, or is it pretty explicit that he shall have a hose or he shall have an extinguisher?

A. No, sir; it isn't explicit.

Q. I see. Now, with respect to this type of work, are there any rules or regulations which you follow or know should be followed relative to contacting local authorities before performing welding operations aboard these ships?

A. No, not by the contractor, I believe. [80]

Q. In other words, who do you feel would have the responsibility then—or do you know who would have the responsibility for—— (interrupted).

A. I think I know. We used to notify the Captain of the Port that we were intending to weld on ships at loading berths and we were notified that it was the operator of the ship's responsibility and we could notify him for—acting for the operator. The habit became discontinued, I mean. We haven't done it for a year or so.

Q. Do you know why specifically it was discontinued? I mean, was this some instructions you received? A. I don't remember, Mr. Mason.

Q. Do you know whether or not this particular operation was reported to the Captain of the Port?

A. No, I don't know.

Q. You did not report it?

A. No, sir; I did not.

Q. Is there anything further that you feel would

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard Bailey.)
be pertinent to this investigation that has not been brought out by this questioning or anything further that you, yourself, would care to add, Mr. Bailey?

A. No, sir; I don't really know much about the actual occurrence. I wasn't there and didn't view it until after the fire and I had gotten there. I don't think of anything.

Q. With respect to the other work which you spoke of that was [81] to be performed on the vessel, did any of that entail the fire main or fire-fighting equipment? A. Yes, sir.

Q. It did? A. Yes, sir.

Q. What specifically was that particular portion of the job?

A. We were renewing the section of fire main connecting the—or connecting the deck and the engine department at the main deck level.

Q. Now, during this particular repair, would that have placed the fire hydrants inoperative?

A. No, sir.

Q. It would not? A. No, sir.

Q. The reason I bring this up—I will make this clear to you, Mr. Bailey, is previous testimony by witnesses has indicated that the water to the hydrant just forward of number five hatch was never—no pressure was brought to that hydrant at any time—— (interrupted).

A. That's right—— (interrupted).

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard Bailey.)

Q. ——and it was understood that that was due to possibly to repairs being made to the fire main.

A. It possibly was, but that didn't render the fire lines inadequate. Upon taking this section of line out, the Chief Engineer made arrangements for us to blank both sides of the line [82] that he could have a solid main in the engine room and a solid main on deck and hook water up from the dock—or was to hook water up from the dock to this fire main so that he would have dock water on the fire main and ship water on the engine room.

Q. Now, do you happen to know whether or not this condition did exist?

A. I know it was blanked off.

Q. You know that the line was blanked off where the section of fire main had been removed?

A. Yes, sir.

Q. You don't know though, whether any dock connection had been made?

A. No, sir; I don't know. I know it was connected this morning. That is when it occurred to me to look.

Q. Well, now, this will prove more an—a more appropriate question to a later witness, but possibly from your past experience, you might be able to answer it somewhat. Do you know what the shore facilities are at the Luckenbach Terminals relative to water. In other words, do they have adequate water facilities to furnish a ship sufficient pressure

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard Bailey.)

for their fire mains in the event of the work of the nature that you were performing on there?

A. I feel that they have. They have two and a half inch hydrants on the face of the dock.

Q. They do have? [83]

A. I assume that they have two and a half inch mains to them.

Q. They do have the hydrants, though, that you are familiar with? A. Yes, sir.

Q. I see. How about the fire pump itself, was that being worked on, too?

A. No, not to my knowledge.

Q. I see. The only section—— (interrupted).

A. Not by us.

Q. And the only section you know of that was being repaired by Albina in either event, was that one section of fire main that had been removed?

A. Yes, sir.

Q. And then by blanking this off and using power from—or water from shore facilities, it was still possible to bring water to the fire hydrant—— (interrupted).

A. That was the plan. I mean, the pipe-fitter and the Chief Engineer discussed this.

Q. Is that a single main system, do you know?

A. On the ship?

Q. Yes.

A. As far as I know, it is.

Q. Now, is there anything further you feel would be pertinent? A. I think of nothing.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard Bailey.)

Q. Or is there anything you would care to say at this time? [84] A. No, I believe not.

Q. Do you know whether there were any other contractors effecting repairs on the vessel?

A. The only other one would be Worthington, that I would know of. I mean, they may have made other arrangements with others, but we had a man from—— (interrupted).

Q. Do you know whether Worthington was?

A. Yes, we had him—— (interrupted).

Q. What was he doing?

A. He was working on the generator with our men.

Q. He was working on the generator?

A. Yes, he was working for Albina though.

Q. I see, so that again, you would be familiar with the work that he was doing? A. Yes.

Q. With respect to the fire system, that is a steam fire pump? And again, if you don't know, say you don't know, because we will have the engineer of the vessel later.

A. That would be better. I don't know.

Lt. Cmdr. Mason: I have no further questions. Thank you very much, Mr. Bailey. We appreciate your presence here today.

(Witness excused.) [85]

Respondent's Exhibit No. 23—(Continued)

ENSIGN HOWARD CHARLES BEELER, JR., U.S.C.G.

was called as a witness by the United States Coast Guard, and first having been duly sworn, was examined and testified as follows:

Examined

By Lt. Cmdr. Mason:

Q. State your full name, rank, serial number, and present duty station.

A. Howard Charles Beeler, Jr., service number is 5907, and I'm an Ensign in the United States Coast Guard, currently stationed at the Port Security Unit, Portland, located on Swan Island.

Q. How long have you been on your present duty station, Mr. Beeler?

A. Approximately a year and a half.

Q. And what is your particular—primary duty at that station?

A. My primary duty is First Lieutenant.

Q. And do you have any duty in connection with the port security function of the station?

A. I'm also—as a collateral duty—Waterfront Security Officer.

Q. I see, and as Waterfront Security Officer, what does this particular position entail?

A. It entails all phases of the security of the waterfront, in that we run routine inspections of pier facilities, checking [85-1] their equipment against the regulations set down in Title 46 USC.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Ensign Howard Charles Beeler, Jr.)

Q. Now, do you have any particular intervals—set intervals—between which you make these various inspections of the terminal facilities?

A. Yes, we do. There are ten facilities that we inspect that actually handle cargo, and we inspect them once a week. In some instances that is not true. When we have other duties at the unit calling us away from it, it does not occur every week, but for the most part, we inspect them at least once a week.

Q. Now, are you familiar with the Luckenbach Terminal? A. I am.

Q. And this, to your knowledge, designated as a waterfront facility?

A. Yes; under the terms in the regulations, it would be a waterfront facility, in that all facilities that meet up with the regulations, have a general designation. In other words, there's a paragraph written in the regulations which designates all facilities as designated waterfront facilities, unless they do not comply with the regulations, and then it may be revoked.

Q. I see, and Luckenbach Terminal falls into this category? A. It is.

Q. Do you know on what date the last inspection or survey was made of that facility? [85-2]

A. The twenty-seventh of March, 1958.

Q. And, at that time, do you know whether or not there was any dangerous cargo found at or about the facility?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Ensign Howard Charles Beeler, Jr.)

A. On that particular date, no, there was not.

Q. There was not?

A. At least there was none reported by my inspectors.

Q. I see. Now, if a vessel moors to the particular facility, does that vessel then become a part of the facility insofar as its cargo aboard is concerned?

A. No, not under the definition of a waterfront facility, which I could read if you wanted me to.

Q. If you would, please.

A. The definition—— (interrupted).

Q. If you would just identify from what you are reading.

A. I'm reading from a publication titled "Security of Vessels and Waterfront Facilities." Its short title is CG-239, which we refer to it as.

Q. And this is an excerpt from the Code of Federal Regulations, Title 33, Parts 6, 121, 122, 125, and 126, is that correct? A. That's right.

Q. All right, if you will read that portion which you referred to before.

A. I am referring to Part 6.01-4. "Waterfront facility. Waterfront facility as used in this part, means all piers, [85-3] wharves, docks, and similar structures to which vessels may be secured, buildings on such structures or contiguous to them, and equipment and materials on such structures or in such buildings."

Q. Now, referring to the subject of dangerous cargo. Are there any existing regulations which

Respondent's Exhibit No. 23—(Continued)
(Testimony of Ensign Howard Charles Beeler, Jr.)
pertain to or require certain actions to be carried out when welding is to be performed on board any vessel or at any waterfront facility when dangerous cargo is aboard such vessel or waterfront facility?

A. Yes. In regards to burning and welding aboard waterfront facilities, the particular part is Title 33, 126.15, paragraph (c).

Q. And if you would identify what it is that you are now reading from.

A. I am referring to the Federal Register Reprint dated 20 December, 1957, which is an amendment to the previous referred to publication. I will read, if you want me to, the particular part in question.

Q. Yes.

A. "Welding or hot work." This is—also I might add—is the specific part which is conditions for designation as designated waterfront facility. There are several paragraphs, this being one. "Paragraph (c). Welding or hot work. That oxyacetylene or similar welding or burning, or other hot [85-4] work including electric welding or the operation of equipment therefor is prohibited on the waterfront facility during the handling, storing, stowing, loading, discharging, or transporting of dangerous cargo thereon, except when approved by the Captain of the Port: Provided, that such work shall not be conducted at any time during the handling, storing, stowing, loading, discharging, or transporting of explosives."

Respondent's Exhibit No. 23—(Continued)
(Testimony of Ensign Howard Charles Beeler, Jr.)

Q. Now, is there anything to determine when an item is or is not deemed dangerous cargo?

A. There is. There is a publication which is Title 46, Parts 146 to 149—146 specifically—which are listed therein dangerous cargoes and articles. There is an excerpt which is a publication which is called "Explosives or Other Dangerous Articles Aboard Vessels."

Q. Now, referring specifically to the articles as published in this publication, how is burlap classified?

A. There are different terms, or I should say different types of burlap. There is burlap cloth, burlap bags, new burlap bags—used or washed, and so forth. I have about four or five of them, they all being dangerous cargo, and their specific classification per this publication is "hazardous article." They have them listed in several categories—hazardous articles, inflammable liquids, et cetera. This one is "hazardous articles."

Q. Now would this imply, then, that were such articles to be [85-5] in the hold of a vessel, then, before any welding could be performed on that vessel, application and approval would first have to be made to the nearest Captain of the Port?

A. That is correct, in that the particular regulation that I quoted here, would be—would not necessarily, under strict interpretations, cover the burning and welding aboard ship, but in this particular publication there is set down a regulation

Respondent's Exhibit No. 23—(Continued)
(Testimony of Ensign Howard Charles Beeler, Jr.)
which would be 146.02-20, which would cover the burning or welding aboard ship, and in essence, it says the same as what I said—that burning or welding shall not be performed when there is hazardous articles present, without specific—now, with regards to this specific section, there should be no hazardous articles or dangerous cargo in the hold when there is burning or welding going on, without the explicit permission of the Captain of the Port.

Q. I see. Now, referring to these specific bales, previously described, of construction paper, and also the rolls of paper, how are these designated, if you can readily find it? If you can't, we can look it up.

A. How they are designated, you say?

Q. Yes.

A. They are designated as hazardous articles, and I was going to—— (interrupted).

Q. Well, are they designated as hazardous articles to the effect that they would effect this previous regulation you [85-6] cited? In other words, that again, the presence of those articles, would require notifying the Captain of the Port before welding is performed? A. That is correct.

Q. That is all I wanted to find out.

A. That is correct.

Q. Now, to your knowledge, was the welding that was to be performed on 2 April, on board the Robert Luckenbach, reported to the Captain of the Port? A. It was not.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Ensign Howard Charles Beeler, Jr.)

Q. It was not. How do you know it was not?

A. Now, you ask the question in that "to my knowledge;" it has been the practice in the past that whenever a report of burning or welding is received, it is immediately transmitted to me, and in turn, I would send a representative of the Coast Guard out, either on a routine inspection—and observe the particular burning or welding while it is in process, or prior to the burning or welding.

Q. I see. Now, is it a practice, also, that when the Captain of the Port is notified that there is welding to be performed under such conditions as we have previously decsribed here, that you would also furnish a fire watch?

A. That we, the Coast Guard, would—— (interrupted).

Q. The Coast Guard would furnish a fire watch?

A. No, sir. [85-7]

Q. Would you require that the vessel furnish a fire watch?

A. We would, yes. I might add something here; that it has been brought to my attention recently, that we have not been getting sufficient reports of burning or welding, and during one inspection of a pier, we happened to observe a crew of men burning and welding, and we requested if they had a permit, which they did not, and we new it was a violation in that specific instance, and I do not remember the name of the company, but I know it was not Albina Engine and Machinery.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Ensign Howard Charles Beeler, Jr.)

Q. Now, as I understand it, on a recent date, you had occasion, also, to send out a copy of the—Federal Register, was it not, pertaining to this subject, to all of the waterfront—designated waterfront facilities in the Portland area?

A. Yes, Commander, that's true.

Q. Is this the particular Federal Register Reprint that you sent (handed document to witness)?

A. That is the one.

Q. Numbered 246, dated 20 December, 1957. And was a copy of this also sent to the Luckenbach Terminal? A. It was.

Q. Do you happen to recall the date on which it was mailed, or approximately when?

A. Approximately a month ago. This reprint came in around the first of the year, or shortly thereafter, and Captain Thayer asked me to read it over carefully, and if there was any [85-8] drastic changes in the regulations, or anything that might be of particular interest to the pier owners, that I should write up a letter to that effect and submit it to those people. There was practically the entire publication—or reprint—that was applicable to these people, so I wrote and got sufficient copies to distribute, and I distributed to the ten facilities which we regularly inspect.

Q. Do you have anything further that you feel should be added or pertinent to this investigation at this time? A. Not at this time, sir.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Ensign Howard Charles Beeler, Jr.)

Q. Do you know whether or not, or did you have occasion to send copies of the Federal Register Reprint to any of the known contractors that accomplish repairs aboard these ships in the Portland area?

A. I could not make a flat statement, "yes" or "no," but I do not believe so. I gave them to my head inspector to mail, and I observed him mailing them to the specific piers, but whether he sent them to the various contractors, I could not say.

Q. With respect to the particular instructions requiring that the Captain of the Port be notified as to welding at waterfront facilities and/or aboard merchant vessels where dangerous or hazardous cargo is involved, who actually is responsible for this reporting, if you know?

A. The way it's specified in the regulations, I do not think [85-9] it—it's either the owner or operator or responsible parties, I believe. In other words, there is a general—it doesn't specify in that particular article who will do the reporting, but it does specify in a closing paragraph at the end of that particular section of this manual, that the responsibility is not taken away from the owner or operator or—then they list on. I can cite that particular paragraph if you want it.

Q. If you would cite that, it might help to clarify. In either event, we won't make this thing lengthy by trying to go deeper than just citing

Respondent's Exhibit No. 23—(Continued)
(Testimony of Ensign Howard Charles Beeler, Jr.)
that, because we can find out and there's no need to have it on the record.

A. This would be sub-part 6.19—"Responsibility for Security of Vessels and Waterfront Facilities." "6.19-1. Primary responsibility. Nothing contained in this part shall be construed as relieving the masters, owners, operators, and agents of vessels or other waterfront facilities from their primary responsibility for the protection and security of such vessels or waterfront facilities." Signed Harry S. Truman, The White House.

Q. Referring back to your earlier testimony, am I to understand that the practice of requesting or notifying Captain of the Port and requesting his permission prior to welding of vessels and facilities having hazardous cargo, has not been done?

A. No, it has been done. Now I kind of mumbled through that [85-10] particular statement. The Captain of the Port is not responsible, naturally, for this reporting, and I believe my statement was that reports had been too infrequent. In other words, it was my explicit opinion that there was more burning and welding going on than had been reported, and that therefore—— (interrupted).

Q. You feel there was a laxity in the reports being made?

A. There definitely was, and that was why I made the statement that I, in recent months, have been initiating a program—or I'm in the process of informing these specific contractors—of which I

Respondent's Exhibit No. 23—(Continued)
(Testimony of Ensign Howard Charles Beeler, Jr.)
mentioned the violation on Terminal four, and I had an understanding with that particular company.

Q. And that is, specifically, why you initiated mailing copies of this Federal Register Reprint to the facilities, also? A. Correct.

Q. On some of these reports that have been received, can you recall who, specifically, made them—whether it was the contractor, the Master, ship owner, or the waterfront facility?

A. No, I don't recall. They phone in their report, and we take it as such and try to get out as soon as we can, but we—who gives us the report, I haven't made specific note of, no.

Q. I see. Do you have anything further that you wish to add at this time?

A. No, I do [85-11] not.

Lt. Cmdr. Mason: I have no further questions; thank you very much, sir.

(Witness excused.)

Lt. Cmdr. Mason: Gentlemen, that's it for today. We will commence at 10 o'clock tomorrow morning.

(Whereupon, at 3:45 o'clock p.m., the preliminary investigation adjourned.) [85-12]

Respondent's Exhibit No. 23—(Continued)

Second Day

(The preliminary investigation reconvened at 10:10 o'clock a.m., Friday, April 4, 1958, with the same parties heretofore mentioned being present.)

JAMES WISHART MAITLAND

was called as a witness by the United States Coast Guard, and first having been duly sworn, was examined and testified as follows:

Lt. Cmdr. Mason: Before proceeding with this witness, I should like to have you make an appearance?

Mr. Gray: Wendell Gray, Attorney, Equitable Building, for Albina Engine and Machine Works, in addition to Mr. Krause.

Examined

By Lt. Cmdr. Mason:

Q. State your full name and address, sir?

A. James Wishart Maitland, 1021 Prospect Ridge Boulevard, Haddon Heights, New Jersey.

Q. And what's your occupation, sir?

A. Master of the Robert Luckenbach.

Q. And you are a licensed officer in the United States Merchant Marine? A. Yes, sir.

Q. Having before me a crew list of the SS Rober Luckenbach for the last voyage, Captain, I notice on here that your license for Master is indicated

Respondent's Exhibit No. 23—(Continued)
(Testimony of James Wishart Maitland.)
to be number 198 821—would that be correct, [86] sir? A. I presume that as being correct.

Q. And how long have you been serving as a Master in the Merchant Marine, Captain?

A. Since 1942.

Q. And you have been going to sea in all how long? A. Twenty-nine years.

Q. And how long have you been employed by the Luchenbach firm?

A. Twenty-one years.

Q. And how long as Master on board the Robert Luckenbach? A. Little over three years.

Q. Has that been continuous with the exception of vacation times? A. Yes, sir.

Q. Captain, as I understand it, the Robert Luckenbach is a cargo vessel, official number 245,923, single screw, propelled by steam, of U. S. nationality, owned by Luckenbach Steamship Company, 120 Wall Street, New York, New York; built of steel in 1944, with a gross tonnage of 7,882, would that be correct, sir? A. Yes, sir.

Q. And your last voyage, I understand, Captain, terminated at Portland on 2 April, 1958, is that correct? A. Yes, sir.

Q. Where did that voyage originally start, Captain? [87] A. I don't quite understand.

Q. Where was your port prior to Portland?

A. Longview, Washington.

Q. And prior to that, sir?

A. Los Angeles, California.

Respondent's Exhibit No. 23—(Continued)
(Testimony of James Wishart Maitland.)

Q. And when did you make your arrival at Longview? A. In the afternoon of April first.

Q. And did you have cargo aboard upon your arrival at Longview? A. Yes, sir.

Q. What did that cargo consist of, basically?

A. General cargo.

Q. And did you off load, or—— (interrupted).

A. No, we took on cargo.

Q. You took on cargo. What was that particular cargo, also general? A. Rolls of paper.

Q. And then you departed Longview and proceeded to Portland. What was the purpose of coming in to Portland, sir?

A. To discharge and load cargo.

Q. And you arrived on the morning of 2 April, is that right? A. Yes, sir.

Q. And did off-loading and on-loading operations commence immediately?

A. Shortly thereafter docking. [88]

Q. And what, specifically, was the cargo that was off-loaded?

A. General cargo, to my knowledge.

Q. And you say you also took on cargo at this time? A. At that time, I do not know.

Q. I see. Now, do you have the information available to you now as to what this general cargo actually consisted of? A. No, sir, I do not.

Q. You are aware, are you not, that part of the cargo consisted of bales of used burlap sacks, rolls of paper, and bales of square construction paper?

Respondent's Exhibit No. 23—(Continued)
(Testimony of James Wishart Maitland.)

A. Yes, sir.

Q. And further included a certain quantity of conduit? A. So I believe.

Q. Now, upon your arrival at Portland, Captain, were there any arrangements made or had there been any arrangements made for any repairs to the vessel?

A. Within my knowledge, no. The only thing I'd known to be in hand was finishing of the third special survey on one generator, and then to complete third special survey.

Q. I see. Was there anything to be done, to your knowledge, with respect to the fire main system?

A. No, sir.

Q. Was there any structural repairs that you know of, to be made, such as welding of beam supports and so on?

A. None to my knowledge. [89]

Q. Now, Captain, I'd like to have you describe for me the fire fighting equipment that you have on board the Luckenbach, with respect to the type of equipment and where each is located.

A. You mean including the hand extinguishers and so forth?

Q. Well, I'm not too concerned with specific number and location of the hand extinguishers, but let us first start with the cargo holds. What type of extinguishing agent, if any, did you have for the cargo holds?

A. We have a built in CO2 system.

Respondent's Exhibit No. 23—(Continued)
(Testimony of James Wishart Maitland.)

Q. Are you also equipped with steam smothering? A. No, sir.

Q. And do you have a smoke indicator in the pilothouse? A. We do.

Q. And you have a general alarm system, do you not? A. Yes, sir, we do.

Q. Now, the extent of this general alarm system is what? In other words, how many controls do you have for activating this system? A. One only.

Q. Just one. Where is that located?

A. It is located in the wheelhouse.

Q. And then do you have bells situated at various intervals throughout the length of the ship?

A. As per Coast Guard regulations. [90]

Q. I see. And with respect to fire hydrants, you have the proper number in accordance with the—— (interrupted).

A. ——existing—— (interrupted).

Q. ——inspections and regulations.

A. Yes, sir.

Q. Do you also have an emergency station bill posted? A. We have them.

Q. Does this include assigned stations for fire stations? A. It does.

Q. Do you normally establish an in-port fire watch? A. No.

Q. Do you know whether any had been established in this particular instance on the second of April? A. None to my knowledge.

Q. Now, as I understand it, some time on the

Respondent's Exhibit No. 23—(Continued)
(Testimony of James Wishart Maitland.)

afternoon of 2 April, you went ashore, is that correct, sir? A. Yes, sir.

Q. Approximately what time was that?

A. Approximately 2:00 p.m.; 2:30 p.m.; in that vicinity.

Q. And when did you next return to the ship?

A. At 10:00 p.m., of the same night.

Q. Now, prior to departing the vessel, were you aware of any repairs at that time that were to be accomplished on board the vessel?

A. None, other than I mentioned. [91]

Q. And then you say you came back to the ship at approximately 10:00 p.m.? A. Yes, sir.

Q. And, upon arrival, what did you find?

A. I found that there was fire fighting equipment from the City of Portland on the ship and there was a fire—at that time was under control according to the fire department—in number five hold of the vessel.

Q. And did you go right on board?

A. Yes, sir.

Q. And was any of the ship's force up and about? A. Yes, sir.

Q. What did you do first when you boarded, did you contact the watch officer? A. Yes, sir.

Q. Who was that?

A. Mister Protik (phonetic), the Junior Third Mate.

Q. And did you receive a report from him?

A. Yes, sir.

Respondent's Exhibit No. 23—(Continued)
(Testimony of James Wishart Maitland.)

Q. And what, basically, were the contents of this report?

A. He told me there had been a fire in number five, apparently started from welding; he told me what he had done upon discovering the fire.

Q. And did you go down and examine the scene yourself?

A. I didn't go down in the hold—it wasn't—I could see [92] what trouble was going on; I did not go down in the hold.

Q. I see.

A. At that time it was rather dangerous.

Q. Do you know whether or not there had been any "No Smoking" signs posted about the ship prior to your departure at around two o'clock?

A. We have them posted on the ship and smoking areas for longshoremen and visiting personnel.

Q. I see. Do you know, prior to departure, whether or not your fire fighting equipment was in good order, such as the fire pump, hydrants and so on?

A. To the best of my knowledge, it was in—— (interrupted).

Q. To your knowledge, they were in good order?

A. Yes.

Q. Now, Captain, who would be responsible for the stowage of cargo on board your vessel?

A. The Master and Chief Mate are responsible to a degree and we have a shore staff of supercargoes that also stow the ship.

Respondent's Exhibit No. 23—(Continued)
(Testimony of James Wishart Maitland.)

Q. And you have a record of the cargo that you had on board? A. Yes, sir.

Q. And as I understand, you don't have that record with you now? A. No, sir, I don't.

Q. Now, did you receive any report from the Mate or anyone [93] else thereafter, relative to the extent of cargo damage resulting from this fire?

A. I have not received any information as to the extent of damage to cargo.

Q. Have you received any information relative to the extent of damage to the vessel?

A. Not yet, sir.

Q. As I understand it, your vessel is presently scheduled for drydocking some time on this date, is it not? A. Yes, sir.

Q. Are they presently off-loading the cargo?

A. Yes, sir.

Q. Now, were you at any time aware of any job order relative to the repairing of the ladder rung which was missing on the ladder in number five hold? A. No, sir.

Q. Did you, prior to the departure from the ship at about two o'clock on 2 April, have any information relative to a job order having been originated for such a repair? A. No, sir.

Q. Now, was it reported to you how the fire started?

A. They reported to me it was assumed it was started from the welding.

Q. And had the Junior Third Mate, in reporting

Respondent's Exhibit No. 23—(Continued)
(Testimony of James Wishart Maitland.)
to you the circumstances that had occurred, also advised you as to what [94] action he had taken?

A. Yes, sir.

Q. And what, specifically, did he report as having been done aboard the ship by the ship's force?

A. Ringing of the general alarm; calling for water on deck; taking a hand extinguisher to the scene of the fire, and having knowledge of the shore side fire department being called.

Q. Now, as a general rule, when you moor at a terminal, such as in this instance, the watch officers go on an eight hour schedule, is that correct?

A. Yes, sir.

Q. Is there also an engineering watch maintained, insofar as the engineering officers are concerned, do you know? A. Yes, sir.

Q. There is. And would I be correct in assuming that the watches are normally established for twelve to eight, eight to twelve, in that manner?

A. You're talking of—— (interrupted).

Q. Twelve noon to eight p.m., eight p.m., to midnight, and midnight to eight a.m.? A. No, sir.

Q. They are not? A. No, sir.

Q. What is the schedule of your in-port watches?

A. In port, the Chief Officer and the Second Officer stand [95] the day watch.

Q. And when you speak of "day watch," does that mean that they are both up and about the vessel, or—— (interrupted).

Respondent's Exhibit No. 23—(Continued)
(Testimony of James Wishart Maitland.)

A. From eight to five.

Q. From eight to five; I see. That's the Chief Officer and the Second.

A. At four p.m., the Junior Third Officer comes on watch from four to midnight.

Q. That's the Junior Third.

A. Yes, sir. From midnight to eight, is the Third Mate.

Q. Do the engineers establish a similar watch schedule, do you know? A. Yes.

Q. Now, what, specifically, are the duties of the Mate on watch during the evening hours?

A. He stands an alert watch, sees that the vessel is well lighted, and checks cargo and, if necessary, sees that the cargo gear is in good working order and, in other words, maintains the ship—an alert watch.

Q. I see. In other words, it's a security watch. Would that be correct?

A. Security is part of it.

Q. When I speak of security, I am referring primarily to the safety of the vessel.

A. Safety of the vessel is—— (interrupted). [96]

Q. And whose responsibility is it to hook up to shore power and water facilities when such is necessary, when you are moored to a terminal?

A. On a live ship we don't do that; the ship has its own facilities.

Q. I see, and assuming that the facilities were

Respondent's Exhibit No. 23—(Continued)
(Testimony of James Wishart Maitland.)
made inoperative for one reason or another, whose responsibility, then, would that be?

A. If we're having work due to boilers or anything else, the contractor—for all my experience—takes care of that; hooking up the shore lines.

Q. I see, but you mean by that, that it's no one's responsibility aboard the ship to see that that is done? For example, if there's to be work accomplished on the fire system, that you nor anyone aboard ship would be responsible to see that shore water facilities are hooked up—— (interrupted).

A. That would be my responsibility to see that that was taken care of.

Q. I see. Did the Junior Third Mate, when he rendered his report to you concerning the fire that occurred when you were off the vessel, did he indicate or report anything with respect to the fact that water was not obtainable at the hydrant?

A. He did.

Q. Did he explain why this was not possible? [97]

A. He didn't go into any explanations to me about it.

Q. Have you since ascertained as to why there wasn't water brought to that hydrant?

A. Yes, sir.

Q. What was the reason for that, sir?

A. They found that part of the fire line had been removed and blanked off.

Q. To your knowledge, is the ship equipped with a single main system? A. Single main system.

Respondent's Exhibit No. 23—(Continued)
(Testimony of James Wishart Maitland.)

Q. And it had been blanked off, and had any connections been made to the shore facilities?

A. When I came aboard, they were connected up—when I saw them.

Q. They were connected up when you came aboard. Were they connected up when you went ashore? A. To my knowledge, I don't know.

Q. Now, this question I will more rightfully be able to address the Chief Engineer, Captain, but do you happen to know, of your own knowledge or from what has been reported to you, whether the removal of this fire main section had caused the lack of water to the hydrants throughout the entire length of the ship, or would this just segregate a certain part?

A. It would segregate the engineroom from the rest of the [98] ship. In other words, the engineroom would have water; the rest of the ship would not, for there was no shore line hooked up.

Q. I see. Have you received any information or instructions, Captain, relative to when your vessel will be departing Portland area?

A. No, sir, not as yet.

Q. It is my understanding that it will be at least until Tuesday before the vessel would be prepared to get underway. Is that your understanding?

A. I have no knowledge of it.

Q. You are remaining with the vessel, are you?

A. To my knowledge, yes.

Q. Now, you've been present during the testi-

Respondent's Exhibit No. 23—(Continued)
(Testimony of James Wishart Maitland.)
mony of the earlier witnesses and, as I understand it, you will undoubtedly be present through the remainder of this investigation, or at least you will be represented by counsel during that time. Because of this, Captain, I am going to tell you at this time that it may be necessary to call you—recall you—at a later date or time for further questioning, but for the present, I have no further questions, unless you have something yourself that you'd care to add or feel might be pertinent to the investigation at this time. A. No, sir, I have not.

Lt. Cmdr. Mason: Very well, Captain. At this time you are [99] excused as a witness.

(Witness excused.)

STANLEY M. RADOVICH

was called as a witness by the United States Coast Guard, and first having been duly sworn, was examined and testified as follows:

Examined

By Lt. Cmdr. Mason:

Q. What is your name and address, sir?

A. My name is Stanley M. Radovich; my address is 7650 S. W. 84th Avenue.

Q. And is that R-a-d-a-v-i-c-h?

A. It's R-a-d-o-v-i-c-h.

Q. And what is your occupation, Mr. Radovich?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Stanley M. Radovich.)

A. I am a Marine Superintendent with Luckenbach Steamship Company.

Q. How long have you been employed by Luckenbach? A. Since September of 1953.

Q. And were you engaged in similar employment prior to that time?

A. I was with State Steamship Company prior to that time.

Q. And what, specifically, do the duties entail, with respect to Marine Superintendent?

A. It entails the hiring, the supervising of personnel, dealing with the loading and discharging of cargo, and in part, as liaison between the ship and our offices in various [100] ports, and in Portland specifically.

Q. Do you have any association with repairs to be effected by contractors or otherwise?

A. No, I don't.

Q. Now, as I understand it, you were on board the Robert Luckenbach on the evening of 2 April, at the time that a fire occurred?

A. That's right.

Q. Now, when did you first board the vessel?

A. This will be an estimation, because I—— (interrupted).

Q. Perfectly all right, sir.

A. I would say it was approximately ten minutes after six—either five or ten minutes after six p.m.

Q. On the second of April?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Stanley M. Radovich.)

A. On the second of April.

Q. And was this the first time you had boarded her since her arrival that morning?

A. No, it hadn't been; I had been on and off the ship an untold number of times during the course of the day.

Q. I see, and what was the specific purpose—reasons for your being aboard numerous times?

A. I had to observe the loading and discharging of cargo; that is my specific function.

Q. I see, and you stated earlier that you were aboard when this fire broke out. When had you boarded at that time? [101]

A. At between five and ten minutes after six p.m.

Q. I see, and was off-loading going on at that time?

A. No, it wasn't; it was between shifts.

Q. The longshoremen had secured the day shift?

A. They had secured at 1800—six p.m.

Q. I see, and as I understand it, now, you witnessed part or possibly all the events surrounding the fire casualty; is that correct, sir?

A. That's right.

Q. Now, if you'd just relate in your own words, exactly what happened—what you saw.

A. Well, I went aboard about five or ten minutes after six p.m. I went up to number two hatch, climbed down to lower 'tween deck to the top of the deep tanks. I was trying to determine how much

Respondent's Exhibit No. 23—(Continued)
(Testimony of Stanley M. Radovich.)
discharge cargo there was left in the deep tanks. That was a very critical problem with us. I climbed back out, went back aft to number five—— (interrupted).

Q. Excuse me just a moment. What was the critical problem with you, relative to the deep tanks? I don't quite understand that.

A. We had—I was directed to attempt to have the deep tanks discharged of cargo and cleaned relative to some ship repair work to be done in the lower 'tween deck of number two hatch. We had made arrangements that we would attempt to have it ready by eight a.m. in the morning, and I had to determine [102] whether or not it would be required to relieve that longshore gang between twelve and one a.m., to facilitate getting the cargo discharged and the hatch cleaned up as he wished it to be.

Q. Do you happen to know what those repairs entail?

A. It entailed installing a false deck—Uni-strut false deck in the lower 'tween deck.

Q. I see. This was to require welding operations, then, was it? A. I couldn't say.

Q. All right, if you will proceed from there.

A. Well, I went back to number five hatch, and the forward end of the hatch was covered, and—— (interrupted).

Q. This was about what time now?

A. About ten minutes after six, and I stuck my head over the coaming to determine if the welders—

Respondent's Exhibit No. 23—(Continued)
(Testimony of Stanley M. Radovich.)

if any welders or any ship repairmen were down in the lower hold—and I no more than peered over the coaming, when I saw this flash and somebody hollered for water—said "Get some water," and then I immediately left and went up to notify the Mate that there was a possibility of fire in number five hatch, and then I went out on the dock immediately and called the fire department.

Q. Were you aware that there was to be some welding performed in that hold? [103]

A. Yes, I was.

Q. When did you first become aware of that?

A. Oh, about twelve noon that day, or it may have been shortly after lunch; somewhere in there.

Q. How did that come about?

A. I was advised by the Port Engineer.

Q. Who was who? What was his name?

A. Mr. Sterling.

Q. What, specifically, did he advise you of?

A. He had indicated that there was a faulty rung in number five, lower hold, and that it was somewhere within four or five feet of the lower hold deck.

Q. And was anyone else present at the time this was reported to you?

A. I can't recall; I really can't recall—we talked on and off all day—I mean different times, and I can't recall if anyone was there at the time or not. Now that you ask me, I do recall. The Chief Mate was present at the time.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Stanley M. Radovich.)

Q. I see. Then you, of your own knowledge then, did know that evening, that there was to be some welding performed? A. That's right.

Q. And had you made any arrangements relative to the time that the welding would be done?

A. Yes, I had.

Q. And that, as I understand it, was to be between six and [104] seven, when the longshoremen were changing shifts? A. That's correct.

Q. And when you looked over the hatch to ascertain if there were any welders down there, you did see the men down there?

A. I did definitely see the men down there.

Q. Did you observe the welding wire leading down there? A. Definitely.

Q. Prior to boarding the ship, had you observed the welding equipment on the pier?

A. Yes, I had.

Q. And when you came aboard at approximately five or ten minutes after six, did you stop to discuss this welding operation with anyone aboard the ship?

A. No, I hadn't. No one was in the present proximity at the time; nobody was in sight connected with it, so it just didn't occur to me.

Q. Well, when you went back to look down in the hold, were any of the ship's force present at that time?

A. By "ship's force," do you mean personnel of the crew?

Q. Ship's crew? A. No, they were not.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Stanley M. Radovich.)

Q. They were not. And the longshoremen, of course, had left? A. That's right.

Q. Now, did you at any time, after you had boarded it at about five or ten after six, see, or have conversation with [105] the watch officer, the Junior Third Mate, who I understand was on watch? A. You mean prior to that time?

Q. Well, at any time from the time you boarded at five or ten after six. A. Up to the incident?

Q. Up to the incident. A. No, I had not.

Q. When did you first see him, if at all?

A. I saw him immediately—as I said before—when they hollered "Get the water—Fire," well, I immediately went up to the Mate's quarters. I had not noticed him on deck prior to—in my earlier walking around the deck, so I assumed he was up there somewhere around the Mate's quarters and that is when I first saw him.

Q. And what did you say then?

A. I told him "It looks like a fire in number five hold."

Q. And did he say anything or do anything?

A. Well, he immediately went out on deck. I'm not too sure of where he went—I'm not too certain—I believe he went on deck aft; he was heading aft, and I, as I said before, I turned around immediately and full speed went to the dock to my office and called the fire department.

Q. Which you did? A. Which I did. [106]

Respondent's Exhibit No. 23—(Continued)
(Testimony of Stanley M. Radovich.)

Q. And approximately how much time elapsed before the fire department arrived?

A. I would estimate to be about four or five minutes.

Q. Now, at any time, did you hear the ship's general alarm go off?

A. I can't recall; I really can't recall. I can't say yes or no—I tend to say no.

Q. However, it's possible it could have sounded while you were off phoning?

A. It could have very well. Being in the office, I would not hear it.

Q. Now, after you phoned the fire department, then you came back aboard, did you, or did you remain on the dock?

A. I remained on the dock to notify my other people, my superiors, and I told my foremen who were in the office that there was a fire and to go up and give all the help that they could.

Q. Who were your foremen?

A. Mr. Suslitch (phonetic) and Mr. Taylor.

Q. And both employed by Luckenbach?

A. Luckenbach.

Q. And you stated that you stayed there to also make a report to your superiors. Did you do that also? A. Yes, I did.

Q. And who were those particular people? [107]

A. Mr. Piper and Mr. Burdick (phonetic).

Q. I see. Now, did you later come back aboard the ship? A. Yes; I did.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Stanley M. Radovich.)

Q. And you have since made a cursory examination of the results of this fire, have you not?

A. Yes.

Q. And what were your findings?

A. Well, there was cargo damage to general cargo in number 5 lower hold forward, two sections of the mid hatch, there is water damage to rolls of wrapping paper. There appeared to be water damage to rolls of wrapping paper in number 4 lower hold. There appeared to be some fire damage and water damage in the lower 'tween deck of number 4 hatch. The center line bulkhead, number 5 lower hold forward; thwartship bulkhead number 5 lower hold forward was scarred and burned, partially buckled. There is some steel plate damage alongside the portside on the skin of number 5—abreast number 5 hatch. That is about the extent of it.

Q. Now, when you first looked down the hold shortly after 6:00 p.m. and observed the men—the welders down there—did you notice whether or not there was any area cleared insofar as the cargo is concerned?

A. The square of the hatch itself was clear of cargo. The cargo in the forward end of the lower hold extended to approximately three to four feet of the ladder—forward of the ladder, [108] in a straight line across.

Q. Well, now, to clarify this, had you stepped down the ladder into number 5, would you have been able to go down and stand on the landing

Respondent's Exhibit No. 23—(Continued)
(Testimony of Stanley M. Radovich.)
ramp at the foot of the ladder or would you have been standing on cargo?

A. You would have been standing right on the deck of the lower hold.

Q. Now, do you recall yesterday that you were in the hold at the same time that I was taking photographs? A. Yes, sir.

Q. And is it not true at that time, when we were down there that that landing ramp had bales of burlap sacks covering the entire deck area?

A. At that time it did, yes, sir.

Q. Has there been any—or had there been any shift of the cargo in that hold that to your—to your knowledge, after the fire?

A. Yes; there has been.

Q. There had been? A. Yes.

Q. What was the purpose of that if you know?

A. The Fire Battalion Chief requested us to remove—to shift some of the cargo inasmuch as there is some smoldering back underneath deep and he wanted to be certain that all the fire was out before they left the ship. [109]

Q. I see.

A. He wanted to make absolutely certain.

Q. So then the bare area of the decking, you might say, in the lower hold, had been covered with—— (interrupted).

A. It had been thrown in that area.

Q. Into that area?

A. To uncover—— (interrupted).

Respondent's Exhibit No. 23—(Continued)
(Testimony of Stanley M. Radovich.)

Q. Other cargo? A. ——deeper cargo.

Q. I see. Now, what specifically did the cargo in Number 5 consist of?

A. Consisted of bales of burlap bags.

Q. Were these new or used bags, do you know?

A. I could not say.

Q. And these as I recall were on the lower tier or two tiers?

A. That is correct. They were covered by other cargo.

Q. And the other cargo consisted of what?

A. There were a few crates of some type of machinery—small crates. There were some cartons of paper, classified as building paper. I imagine that is what we refer to it as—building paper—various colored paper in various dimensions and sizes and some general cargo or which I have no specific record as to just what it was.

Q. There were rolls of paper there?

A. That's right, that we had loaded at [110] Longview.

Q. What was the next time that you saw the Junior Third Mate on watch, after the initial time of reporting to him of the fire? If you did see him?

A. Well, things were pretty confused. I couldn't say exactly, sir. I know I talked to him several times during the course of the evening. During the fighting of the fire, I bumped into him in—being back there on deck, back aft and—— (interrupted).

Q. Now—— (interrupted).

Respondent's Exhibit No. 23—(Continued)
(Testimony of Stanley M. Radovich.)

A. ——on the main deck.

Q. ——from what you observed with this combatting—was this combatting of the fire accomplished solely by the Portland Fire Department or was the ship's personnel engaged in combatting the fire also?

A. Initially, the ship's personnel was engaged.

Q. Initially, you mean before the Fire Department arrived? A. That's right.

Q. In what respect?

A. They had run hoses back to number 5 lower hold.

Q. On port or starboard or both?

A. I could not say definitely. I know that—— (interrupted).

Q. Well, can you recall whether it was the offshore side or the pier side?

A. I know for sure one hose appeared to be on the port side. Other than that, I couldn't say. [111]

Q. And did you at any time observe water emitting from the ship's hoses? A. I did not.

Q. So when you speak of the action which was initiated by the ship's force, you speak strictly of laying out the hose? A. That's right.

Q. Was there any other ship's action taken that you observed, such as bringing any extinguishers to the scene or the forming of a bucket brigade—any action along that line?

A. No, sir; I did not see any action.

Q. Can you estimate for me approximately how

Respondent's Exhibit No. 23—(Continued)
(Testimony of Stanley M. Radovich.)

long between the time that the fire first broke out as you saw it and the time that the Fire Department actually had water at the scene—in other words, when the first water was placed into the hold? If you can? I am trying to get an estimate.

A. I can't say; I can't.

Q. Can you estimate for me? I mean, would it have been as much as twenty minutes?

A. I would say ten to fifteen minutes.

Q. Ten to fifteen minutes?

A. To my knowledge. I can recall now, going back to an earlier question, that definitely seeing a ship's fire extinguisher on deck at number 5.

Q. You did see—— (interrupted).

A. I definitely saw—— (interrupted). [112]

Q. ——an extinguisher?

A. ——a fire extinguisher at number 5 hatch.

Q. What kind of an extinguisher, do you recall that? Was it CO_2 or pyrene? Soda acid?

A. I am not too familiar with ship's equipment so I couldn't say. I know there is a red painted fire extinguisher and I believe it had a number three on it. I am not too certain now.

Q. Did you witness any of the men in the number 5 hold, such as the welders, when they came out of the hold—did you see them come out?

A. At what time? At any time?

Q. At any time after the fire first broke out.

A. I saw one man come out.

Q. Do you know who that was?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Stanley M. Radovich.)

A. I don't know who that was.

Q. Did you observe him to do anything or did you just see him come out and leave the area?

A. I saw him climb out.

Q. Now, as I understand it, when you were looking over the hatch, you actually saw the spark fly—— (interrupted). A. That's right.

Q. ——from this welding equipment? Did you immediately depart the area or did you wait to see whether any flames developed?

A. I immediately departed. [113]

Q. You did right away?

A. (Affirmative nod.)

Q. So you don't know for sure or didn't know at that time for sure whether the spark had actually ignited the cargo to any degree?

A. No, I could not say that—— (interrupted).

Q. Did, at this time, anyone of the group below—the welders call up and say anything? Did they call out "fire"?

A. Yes, they did. Somebody hollered "fire."

Q. Somebody in the hold?

A. Somebody in the hold hollered "fire."

Q. Now, did you state that at this time you have no estimate of the damage involved?

A. I have no estimate myself.

Q. Are you now—disregarding estimate insofar as costs are involved, do you have any knowledge or information relative to the extent of damage in-

Respondent's Exhibit No. 23—(Continued)
(Testimony of Stanley M. Radovich.)
sofar as the tonnage or quantity of cargo is concerned?

A. How much tonnage of cargo was affected?

Q. Yes, by either water or fire.

A. Yes; I have an estimate.

Q. And what are those estimates?

A. It would be approximately four hundred tons of wrapping paper; seventy tons of general cargo, I'd say.

Q. And the general cargo would include the construction paper [114] and burlap sacks and so on?

A. Cartons of candy, cartons of cocoa syrup in number 4.

Q. Was there also water damage in number 4 to the cargo? A. Yes; there was.

Q. Now, can you recall whether or not number 4 hatch was covered at the time that you first observed the start of the fire?

A. Number 4 hatch was covered.

Q. It was covered? A. Yes.

Q. Did you notice who uncovered it? In other words, was it the ship's force or the Fire Department? A. I did not notice.

Q. And number 5, I believe you stated earlier, was partially uncovered, is that right?

A. Yes.

Q. How much of an opening would you say—was it the forward half of number 5 hatch was opened or (interrupted)——

A. The aft half of number 5 hatch was open.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Stanley M. Radovich.)

Q. Oh, the after—the after half?

A. (Affirmative nod.)

Q. Do you happen to know who delivered the welding apparatus that was on the pier?

A. You mean by person or company or?

Q. Company, person—in either event, who actually made the [115] delivery or arranged for the delivery. Was it you? A. No; not me.

Q. It wasn't you?

A. It's not my responsibility.

Q. I see. You had nothing to do with it?

A. I had nothing to do with it.

Q. Now, again disregarding estimate insofar as costs are concerned and realizing, of course, that you haven't had opportunity to observe the entire extent of the lower level of number 5, since the cargo, as I understand, has not been completely discharged from that area yet, but in your examination yesterday, did you observe any structural damage yourself in number 5? A. Yes; I did.

Q. What did you see?

A. Metal bulkheads which had been affected by fire, burnt paint, some buckling or seemed to be warping; some sweat battens were burned and some smoke damage.

Q. This buckling, did it appear over a large area or to a rather relatively limited?

A. It was what I would call a limited area.

Q. And was this to the bulkhead separating number 4 and number 5?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Stanley M. Radovich.)

A. That's right. Also the centerline bulkhead, running fore and aft.

Lt. Cmdr. Mason: I have no further questions at this time [116] specifically, Mr. Radovich. Is there anything that you feel you would care to add that would be pertinent to this investigation—anything at all that you might care to say?

A. No; not at this time.

Q. With respect to the fire extinguisher which you stated you saw at the scene, was this observed by you before or after the fire had started?

A. After the fire had started.

Q. And in relation to the hatch being partially opened, was the forward part covered by a tarpaulin and hatch covers or just what was the covering?

A. It was covered by hatch pontoons and tarpaulins—the forward part.

Q. And then realizing, of course, that you are a considerable distance above the workmen in the lower hold when you observed the spark, are you able to determine whether that spark appeared to fall to the deck or shoot in an upward direction?

A. Well, I choose to say that it went—well, I really couldn't say—I really couldn't say.

Q. Well, let me ask you this—have you seen electric welding performed before? A. Yes.

Q. And isn't it your experience that electric welding that—does develop considerable spark that fly out—that seem to fly out in all—seem to fly out considerably in all directions? [117]

Respondent's Exhibit No. 23—(Continued)
(Testimony of Stanley M. Radovich.)

A. Well, not necessarily.

Q. Well, Mr. Radovich, what I am trying to make clear here for the purpose of the investigation is, you stated that you saw the sparks (interrupted)—— A. Right.

Q. ——and then without any further delay, you immediately rushed to find the mate on watch to notify him of a possible fire. Well, you must have seen more than just a mere contact of an electrode which threw a couple of sparks, and yet you stated that you saw no flame?

A. Well, I saw the spark. Now, whether it went up or down or straight ahead, I don't know—I couldn't say, but I definitely saw a spark. To my recollection it tended to arc, like this (indicating).

Q. I see. And you knew that welding was going to be performed then, is that correct?

A. Yes, sir.

Q. But this spark gave you the impression that a fire was imminent?

A. No; I only reacted when I heard this man holler "fire."

Q. I see. In other words, you left the scene after someone called "fire" then and proceeded up to notify the mate? A. Right.

Q. It was actually the call of fire that prompted you to take that action? [118] A. Right.

Q. Now, I understand. Was it dark down there?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Stanley M. Radovich.)

A. It was not absolutely dark, but it wasn't—it wasn't daylight by any means.

Q. Were there any artificial lights—lighting down there? Were any of the ship's lights on, do you recall? A. I can't recall.

Q. Were you able to observe the scene fairly clearly yourself? A. Fairly clear, yes, sir.

Q. Did you notice any partitions up around the area where the welding work was to be performed?

A. I saw what appeared to be a plywood board to the right of the ladder as you are facing forward. That's about the extent of it.

Q. That was the only partition that you observed?

A. That's the only thing I observed.

Q. Do you have anything further you would care to add at this time? A. No.

Lt. Cmdr. Mason: Thank you, very much, Mr. Radovich.

(Witness excused.)

B. Z. PROTIC

was called as a witness by the United States Coast Guard, and first having been duly sworn, was examined and testified as follows: [119]

Examined

By Lt. Cmdr. Mason:

Q. What is your name and address, sir?

A. My name is Branislav Protic.

Respondent's Exhibit No. 23—(Continued)
(Testimony of B. Z. Protic.)

Q. And that is spelled P-r-o-t-i-c, is that correct, sir? A. That is correct.

Q. And what is your address, Mr. Protic?

A. My address is 98-30 Sixty-seventh Avenue, Forest Hills 74, New York.

Q. And you are a licensed officer in the Merchant Marine, is that correct, sir?

A. Yes, sir.

Q. And am I correct in assuming that your license number is 228012 as indicated on the ship's crew list?

A. It must be there. I don't recollect the number exactly, but it must be correct here.

Q. How long have you held a license in the Merchant Marine, Mr. Protic?

A. In the United States Merchant Marine, I hold a license from September, 1956.

Q. I see, and did you sail in the Merchant Marine of another country prior to that?

A. Yes; I sailed in the Merchant Marine of my original country, Yugoslavia.

Q. Yugoslavia?

A. Yugoslavia on a Master's license. [120]

Q. I see, and how long have you been seafaring altogether, Mr. Protic?

A. Since 1927—that's thirty-one years.

Q. What license do you presently hold now in the United States Merchant Marine?

A. Master's license.

Q. That's unlimited license, is it? Any tonnage,

Respondent's Exhibit No. 23—(Continued)
(Testimony of B. Z. Protic.)

any ocean? A. Unlimited Master's license.

Q. I see, and how long—are you presently employed by the Luckenbach firm? A. Yes, sir.

Q. And, as I understand, you are presently serving as Junior Third Mate on board the S.S. Robert Luckenbach? A. That's correct.

Q. How long have you been serving aboard that vessel? A. Since July 23, 1957.

Q. I see, and were you on an American merchant ship prior to that?

A. Yes, sir; I was with Lindberg-Rothschild Company of New York as Chief Officer; and I was sailing also with a subsidiary of United Fruit for seven years, which about five years as Chief Officer.

Q. I see. Now, as I understand it, you were the watch officer on the Robert Luckenbach on the evening of 2 April when the vessel sustained a fire casualty while moored to the Luckenbach [121] Terminals in Portland, is that correct?

A. That's right, sir.

Q. When did you first go on watch?

A. I went on watch at 4:00 o'clock in the afternoon—sixteen p.m.

Q. Who did you relieve at this time?

A. I didn't relieve anybody, because the Second Mate and the Chief Mate had the watch until 5:00 o'clock and then mine started at 4:00 going to 12:00, so that means that I relieve them at 5:00 o'clock.

Q. I see. So you actually went on watch at 4:00 (interrupted)—— A. 4:00 o'clock.

Respondent's Exhibit No. 23—(Continued)
(Testimony of B. Z. Protic.)

Q. ——but you didn't relieve as watch officer until 5:00 when the Chief and Second Mates went off? A. Well, that's correct.

Q. Now, when you first went on watch at 4:00 o'clock, was there any activity going on about the ship? A. Yes, sir.

Q. What was (interrupted)——

A. We had—we had discharging operations in all hatches.

Q. And longshoremen were aboard handling that?

A. The longshoremen were aboard ship, that is correct.

Q. Were there any repairs being effected that you know of? A. No, sir. [122]

Q. No repairs? And at 5:00 o'clock then, the Chief and Second Mates went off watch?

A. Yes.

Q. Did they give you any instructions at this time?

A. Just routine instructions for the safety of the ship.

Q. What specifically were you told?

A. Nothing specifically was I told at that time.

Q. Didn't the Chief Mate contact you and say that he was going off watch? A. No.

Q. He did not? Did the Second Mate contact and tell you that he (interrupted)——

A. I contacted the Second Mate at 4:00 o'clock and he gave me all the information what was going

Respondent's Exhibit No. 23—(Continued)
(Testimony of B. Z. Protic.)

on in the hatches and I was going around the hatches, and at 5:00 o'clock, the Second Mate ceased to be on watch, so I stood the watch and continued with what was going on.

Q. Now, when the Second Mate gave you the information at 4:00 o'clock, did he give you any information other than the fact that off loading was being accomplished? A. No, sir.

Q. And what particular holds were being worked at this time?

A. All the holds—numbers one, two, three, four, five.

Q. All of them? A. All of them. [123]

Q. And was it off loading from all of them or was there on loading also?

A. No; there was discharging everywhere.

Q. Discharging everywhere? A. Yes.

Q. Now, what was the condition of the lighting system at the time, were you on ship's power, do you know? A. Yes; we were a live ship.

Q. And then how about the fire system?

A. As far as I was concerned, we were a live ship, so the fact (interrupted)——

Q. So that all of the facilities were available for operation on the ship?

A. They were available, yes.

Q. Now, when did you first receive any information that a possible fire might be present aboard?

A. I received the information at 1815, was what I put in the log book after—immediately after

Respondent's Exhibit No. 23—(Continued)
(Testimony of B. Z. Protic.)

everything happened. At that time, I had just finished because the longshoremen left something before 6:00—around 1755, and I went as a routine inspection around the decks, checking lines, checking lights and holds, checking if the cluster lights are around and putting on lights—checking the lights and took the name of the gangway watchman so as to put his name in the log book and then I went out to (interrupted)—— [124]

Q. Just a minute. When you speak of the gangway watchman, was this a Burns Detective man?

A. Yes; I think so.

Q. I see.

A. His name is Johanson (phonetic). And I went out to read the draft and when all of it was finished, I went to my room to put all those drafts in the log book, and I just started to writing the log book, in fact it was the first word I put down, Mr. Radovich came to my room and he said, "We have a fire in number 5." Something—that is not exactly his words, but I understood there was fire in number 5. So I jumped right away from my room—number 5 came to my mind—we have in number 5, we have bales of burlap, paper. It was a matter of—if the fire was small, a matter of a soda acid fire extinguisher. I jumped down the ladder. The first available soda acid fire extinguisher nearest the spot was on the portside of the entrance to the crew's quarters, aft. I took the fire extin-

Respondent's Exhibit No. 23—(Continued)
(Testimony of B. Z. Protic.)

guisher from the place there. When I arrived at the spot, there was nobody there.

Q. At number 5 hatch, you mean?

A. Number 5 hatch.

Q. There was nobody there?

A. Nobody there. So I (interrupted)——

Q. Did you look into the hatch?

A. I looked into the hatch. There was very big smoke coming [125] out. I didn't see anybody in, so, as I was alone on deck, I was unable to lower that fire extinguisher. The only thing was to give the general alarm, to get some men on deck. So I jumped on the bridge and gave the general alarm. At that time, the automatic general alarm, the smoke-detecting system, went off, too. So I really had two alarms and then I came back and at that time, when I came back, I saw Mr. Kand, who was the Third Mate. He told me he heard the alarm and (interrupted)——

Q. Where was he on deck? Whereabouts?

A. Near number 5. He was undressed.

Q. Near number 5—I see.

A. He was completely in his pants and just his shoes on. And I saw a man standing near him which at that time I didn't know who it was. I supposed it was one of the welders that was inside.

Q. You supposed it was what?

A. I think it was one of the welders (interrupted)——

Q. One of the welders, I see.

Respondent's Exhibit No. 23—(Continued)
(Testimony of B. Z. Protic.)

A. ——or one man which—whom I have never seen before, and I went into the masthouse and stopped the ventilation. At that time, several members of the crew were out, including the Bos'n, and they were stretching the hoses.

Q. They were stretching the hoses?

A. Stretching the hoses. Kand and me, we took care of the after hose, which is on the entrance to the lazarette, and the [126] Bos'n and the crew stretched the hose from the masthouse, which is forward of the hatch and at the same time, Kand gave the orders to bring some additional sections of hoses, to double from the house, so that we have four hoses. At that time, Kand told me that somebody was in the hold yet, and through that smoke, then we started looking for the man in the hold.

Q. Well, did you call down for him, did you?

A. We called down—no answer. And then there was again one man whom I don't know who he was, and he said there was somebody there, so opened the main hold, calling—everybody was calling—no answer.

Q. Now, when you rigged the hose, you stated that you assisted to lead out one of those?

A. Lead out the hose aft of number 5.

Q. Would the hose from the hydrant forward of number 5 already into the hold?

A. I didn't see, but I think that the—that it is natural that the hose of number 5—aft of what we

(Testimony of B. Z. Protic.)

were rigging was first in, because the other one is farther and would have to go all around.

Q. Now, did you direct anyone to notify the engine room for pressure on deck, or would that have been automatic?

A. That should be automatic because the alarm was given and also the fire-detecting system gave the alarm which was ringing in the engine room, which means water on deck. [127]

Q. I see. All right, now, what happened after you rigged the hoses?

A. Now we lost some time in trying to get that man out in the hold. I don't know—two, three minutes, maybe, passed by—then I noticed there was no water in the hold, because I couldn't play the jet on if somebody was in the hold. And Kand said the men was out. Right now, we open the valves—no water. There is a telephone right there on the poop deck. I called the engine room and I said, "There is no water on deck." They said, "The pump is running full speed; the water is coming."

Q. Do you know who you spoke with?

A. Third Assistant—Junior Third Engineer.

Q. The Junior Third Engineer?

A. I recognized his voice.

Q. Was he the watch engineer at the time, do you know? A. Yes, sir.

Q. The Junior Third Assistant Engineer?

A. Yes, sir.

Q. And he said that the water is coming?

Respondent's Exhibit No. 23—(Continued)
(Testimony of B. Z. Protic.)

A. "The water is coming; the pump is running."

Q. And what happened after that? Did you ever get the water?

A. Not at that time; then the firemen arrived.

Q. Then the firemen arrived. All right, and what happened then? [128]

A. Then when the firemen arrived the Fire Chief, Mr. Post, was in charge. He came right there on deck and they had the hoses as I can see—the whole time, as I reconstructed it later and I put in the log book—since I first was notified about the fire and the first hoses seen with the jets, eight minutes.

Q. Eight minutes for the—for the water to the scene from (interrupted)——

A. Eight minutes, the first jets were in.

Q. Eight minutes from what? From the time the Fire Department arrived?

A. Mr. Radovich notified me.

Q. I see, in other words, at—a total of eight minutes from the time you received the notification to the time that the Fire Department had water (interrupted)——

A. Had water in the holds and (interrupted)——

Q. ——in the hold.

A. ——they also sent right away two or three men with those oxygen apparatus there inside the hold to look at the fire.

Respondent's Exhibit No. 23—(Continued)
(Testimony of B. Z. Protic.)

Q. I see. Now, did you ever get water on the ship's hose? A. I didn't.

Q. Was the—were the valves at the hydrants left in the open position so that (interrupted)——

A. The valves were opened.

Q. But water never did reach the hydrants?

A. I didn't notice.

Q. Were men standing by—crew men standing by the ship's hoses?

A. Yes; yes. We had—I think altogether, of all departments, we had about ten or fifteen men there. I know several of the names, about five or six, but I don't know the others, because I had no time.

Q. In all, how many ship's hoses were rigged to the (interrupted)——

A. Two were inside and the two were being rigged from the—because we had to double them. The distance is pretty big from the house so there is a total of four hoses there.

Q. I see. And to your knowledge, no water ever came out of those ship's hoses?

A. I didn't notice any.

Q. Now, you didn't at any later time notify the engine room to secure the fire pump, did you?

A. No, sir.

Q. Now, were you notified at any time that welding repairs were to be accomplished on board the ship? A. No, sir.

Q. You were never notified of this?

A. No.

Respondent's Exhibit No. 23—(Continued)
(Testimony of B. Z. Protic.)

Q. Were you aware of the fact that welding repairs would be accomplished? [130]

A. No; I never knew.

Q. Did you at any time see the men or equipment come aboard? A. No, sir.

Q. And your first knowledge of the fire was when Mr. Radovich notified you?

A. Mr. Radovich, yes.

Q. And that was at 8:15—1815?

A. 6:15, that's correct.

Q. Yes. Was that accurate? In other words, had you observed it on the clock?

A. Maybe one minute on or off.

Q. But very close?

A. Very close and I put that time in the log book.

Q. Of 1815? A. 1815, yes.

Q. Now, the alarm was sounded and hoses rigged, ventilation was secured, as you stated, and —did you notify Mr. Radovich to call the Fire Department or did (interrupted)——

A. No; it was my understanding—I don't recollect whether he told me, but I was under the impression when I went on the bridge that Radovich was going to call the Fire Department at the same time and that's what exactly happened. Now, how it came to my mind, I think that he must have told me, "I'm going to call the Fire Department."

Q. I see. At the time that you were notified of the fire, [131] what were the conditions of the

Respondent's Exhibit No. 23—(Continued)
(Testimony of B. Z. Protic.)

hatches? Were they all opened—all five hatches opened? A. Partly—in part.

Q. In part?

A. And they have tents on them.

Q. And how about number 5 specifically?

A. Number 5 had three pontoons aft off.

Q. And that was at the after end, was it not?

A. Aft.

Q. And you say it was eight minutes from the time you first received the notification (interrupted)——

A. Eight minutes (interrupted)——

Q. ——which would be (interrupted)——

A. ——because when the firemen arrived, then I looked at the watch.

Q. And that would be?

A. That was 1823.

Q. 1823? A. 23, the first hoses are in.

Q. Now, who else besides yourself, if anyone, was on watch at the time that you had your watch?

A. Nobody, sir.

Q. No one else? There was an engineer, of course?

A. An engineer in the engine room, yes.

Q. On deck, there was no one other than the (interrupted)—— [132] A. The gangway man.

Q. ——gangway man, who was a Burns Detective man? A. That's correct.

Q. He wasn't a crewman in either event?

A. No.

Respondent's Exhibit No. 23—(Continued)
(Testimony of B. Z. Protic.)

Q. Now, did you at any time ascertain for yourself what caused this fire?

A. At the time, when the fire came, before—for awhile I didn't know how the fire came at all. It was only after a few minutes that I learned that—when Mr. Kand was on deck at that time known that there was welding. The fire was caused by the welding.

Q. Who was on deck?

A. The Third Mate.

Q. Did he tell you?

A. He told me because he came right away after the alarm and he saw that man on deck there. So he got the information.

Q. Now, after the fire department arrived and had water to the scene as you have stated, what did you do then?

A. I was watching what they were doing, because it was more or less the whole technical work was out of my hands. I went to check what I could—to check the bulkhead of between number 4 and number 5, because I was suspecting if the fire was near that the bulkhead is going to get warm. So I contacted the Chief—Fire Chief, Mr. Post, and I told him that we should [133] check that and he agreed. As a matter of fact, he had already one force coming out. It was a simultaneous decision somehow, and he opened the manhole between number—leading into number 4 and led the hose through, and he had the men posted there down to watch, and the men came back the first time,

Respondent's Exhibit No. 23—(Continued)
(Testimony of B. Z. Protic.)

came out, and he told me, "Not warm yet; just lukewarm." Mr. Post told him that he is to maintain a constant watch there, and that man was in with his apparatus and the hose was led in, cooling the bulkhead. So, after awhile—it was about—it was about 1840, the ship's crew, we opened the pontoons forward of that hatch, so that we can see from outside what it is that started smoking, the paint inside of the hatch number 4 started peeling off and the smoke was thick, so we couldn't have done any more to watch at that spot there. So we opened, the crew, the pontoons forward and they let some hoses into it and the fire broke there about, I think, eighteen something—6:40 or something like that. I put that in the log book, but I can't recollect. And that fire was under control after ten minutes. And we then have to concentrate a watch there.

Q. And then at what time was the fire reported out, can you recall?

A. Reported out completely, it was late in the night. It was—just finished after my watch because after the fire was under control, they were just now looking for smoldering places behind, at that time was after 7:00 o'clock. [134]

Q. In (interrupted)——

A. In the hold number 5.

Q. Seven o'clock?

A. About—I think it was 1945.

Respondent's Exhibit No. 23—(Continued)
(Testimony of B. Z. Protic.)

Q. Approximately an hour after the (interrupted)——

A. All the smoke was out, the men could go in and we knew that there was still smoldering between the bulkhead and the cargo which was adjacent to it, so they had to dig out the cargo in order to find those nests down and that operation terminated after my watch.

Q. And was a fire watch maintained after the fire was reported out, do you know?

A. In which instance?

Q. Well, was any one of the ship's force assigned to the fire watch to (interrupted)——

A. There was the mate—Mr. Kand was there.

Q. I see. And alone? Was there anyone else on watch with him, do you know?

A. I don't know if there was or not.

Q. Now, as I understand it, at no time did the Chief Mate report to you that welding was to occur during your watch on board the ship?

A. No, sir.

Q. You were not, at any time, up to the time the fire started, aware that there would be welding operations? [135] A. No, sir.

Q. Did you attempt to ascertain at any time later, after the arrival of the Fire Department, why you had not obtained water at the ship's hydrants?

A. I was interested in it, but I couldn't obtain any information. I don't know.

Respondent's Exhibit No. 23—(Continued)
(Testimony of B. Z. Protic.)

Q. Did you ask anyone as to why you didn't get water?

A. No; I was talking with Mr. Kand and I understand there was some repair, I don't know.

Q. But you, yourself, didn't inquire (interrupted)——

A. No; I didn't inquire because it was not my business. The only thing, the Second—the First Assistant, he came on watch, when he came around 7:00 o'clock, I told him we had no water. It was already the fire was out.

Q. You told him you had had no water?

A. That I had no water.

Q. And did he say anything?

A. He said, "We had something working on the pump."

Q. Something to the effect that they had been working on the pump? A. Yes.

Q. You are not sure just what it was?

A. No, sir.

Q. Now, do you have anything else, Mr. Protic, that you would care to add at this time, that you feel might be pertinent [136] to this investigation, that hasn't been already brought out by the questions?

A. No, sir; I think this is everything.

Lt. Cmdr. Mason: I have no further questions, then; thank you very much, sir.

Mr. Krause: Might I suggest one, Commander? He estimated how long it took them to get water

Respondent's Exhibit No. 23—(Continued)
(Testimony of B. Z. Protic.)

on it after the firemen arrived, but how long did it take them to get their own hoses laid out in position so that they could have had water on the fire?

Q. Let's get that in as an additional question. Just one more question, Mr. Protic: Approximately how long from the time that the fire was first reported to you (interrupted)——

A. Yes.

Q. ——was it until you had your own hoses laid out?

A. When the fire was first reported to me until the hoses were laid out—might be at the most three minutes.

Q. At the most three minutes?

A. Three minutes the hoses were in place.

Q. And, as I understand it, you stated that you believed that when you had these rigged that you found one hose was already leading from the forward hydrant down into the hold?

A. Not already.

Q. Oh, it was not already?

A. No, not already. And when I came back, I found Mr. Kand [137] on deck and the crew started to arrive, so Kand and myself were putting the extinguishers near the hold, going to the bridge, ringing the alarm, I heard the—the deal going on in the engine room, coming back, I saw Mr. Kand and we grabbed the hose, at the most, three minutes.

Q. At the most, three minutes?

Respondent's Exhibit No. 23—(Continued)
(Testimony of B. Z. Protic.)

A. Three minutes and the other hose followed very closely. We had both of them right in. Now, for the next ones, we had to bring some additions. I think those two hoses were two minutes later on.

Lt. Cmdr. Mason: All right, thank you, very much.

Mr. Wood: Commander, there is just one question we want to suggest.

Mr. Winterling: I wonder if you could ask him how long it was from the time the last shipyard worker was out of the hold. I think he said there was a man still in there at one time, when they all appeared on deck and were dragging these hoses. I think he said that there was a man still in there.

A. That's correct.

Mr. Winterling: I want to know how long it was from the time that that man was finally out until the Fire Department appeared on the scene with water (interrupted)——

A. That man was out (interrupted)——

Lt. Cmdr. Mason: Wait just a minute now. I still don't follow your point here. What is it—what is it you are trying to [138] establish?

Mr. Winterling: I am trying to establish that after the hoses were rigged, and they were ready for water, that there was a shipyard worker still in the hold, and, as I understand it, it took quite some time to get them out, and, as I understand, he might have been overcome with smoke and what not. He was fairly groggy when he arrived on deck;

Respondent's Exhibit No. 23—(Continued)
(Testimony of B. Z. Protic.)
and I was just wondering from the time that he finally left the hold—the time element and the time that he actually cleared the hold and the Fire Department arrived, what that time element was.

Lt. Cmdr. Mason: From the time that the man left the hold to the time that the Fire Department arrived?

Mr. Winterling: With the water. In other words, what I meant was, if they had the water available —I naturally know there wasn't any water—if they had the water available, would they have been able to use it immediately anyway, with that man in the hold?

Lt. Cmdr. Mason: Well, now, of course, before we ask that question, we should bring up: You weren't here yesterday?

Mr. Winterling: Right.

Lt. Cmdr. Mason: And yesterday, we had testimony indicating that the one man stayed down in the hold with a hose, waiting for water and hollering for water and never got it.

Mr. Winterling: I see.

Lt. Cmdr. Mason: And he is the man. That was Larson, he [139] remained down there until last. Does that answer what you were after anyway?

Mr. Winterling: It does.

Lt. Cmdr. Mason: He was down there with a hose screaming for water.

Mr. Winterling: It does.

Respondent's Exhibit No. 23—(Continued)

Lt. Cmdr. Mason: That's all, sir; thanks, very much.

(Witness excused.)

(Whereupon, a recess was taken from 11:50 o'clock a.m. until 2:05 o'clock p.m., at which time the investigation reconvened.)

Afternoon Session

ANTHONY KAND

was called as a witness by the United States Coast Guard, and, first having been duly sworn, was examined and testified as follows:

Examination

By Lt. Cmdr. Mason:

Q. Please state your full name and address, sir.

A. Anthony is first; Kand—K-a-n-d. 458 West 23rd Street, New York City.

Mr. Roberts: Would you spell your name?

A. K-a-n-d.

Mr. Roberts: And your address?

A. 450 West 23rd Street—458.

Mr. Roberts: 458? [140]

A. Yes. West 23rd, New York City.

Q. And, as I understand it, Mr. Kand, you are a licensed engineer in the United States Merchant Marine? A. Licensed mate.

Q. I'm sorry—licensed mate in the United States Merchant Marine, and referring to the crew

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)
list for the last voyage of the Robert Luckenbach, I notice that you have License Number 225 587, is that correct, sir? A. Yes.

Q. And you are presently serving as Third Mate on board the S.S. Robert Luckenbach?

A. Yes.

Q. And how long have you been sailing in a licensed capacity, Mr. Kand?

A. Since April, 1943.

Q. And how long have you been going to sea in all?

A. I have been going to sea about thirty-four years.

Q. And how long have you been employed by Luckenbach?

A. I have been employed by Luckenbach since 1937.

Q. And on board the Robert Luckenbach since when? A. Since 1956.

Q. And has that been continuous since '56?

A. That has been continuous except for vacations.

Q. Now, were you on board the Robert Luckenbach on the evening of 2 April, when the fire occurred? [141] A. I was.

Q. When did you first become aware that a fire had occurred?

A. It was shortly after 6:00 o'clock. I can't recall because I was in my room and ready to turn in, listening to the radio, and I heard somebody

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)
went by—my door was on the hook, and asked, "Where is Mr. Protic?" So I didn't know who it was. I said, "Mr. Protic must be on deck because he is on duty." About maybe thirty seconds later, somebody else came by and I recognized—it looked like it was Radovich's voice—but I didn't see the man, because my door was cracked only, you know, see? So he says, "Where is Mr. Protic; there is smoke in number 5." That is what I heard. Then when I heard that, I was already undressed, except I had pants on and I was barefooted. I put on my shoes on and I put my cap on and I rushed to the scene of the fire as soon as I could.

Q. Now, when you arrived at the—when you say the scene of the fire, you mean number 5 hold?

A. Number 5, yes.

Q. When you arrived at the hatch, what did you observe?

A. I arrived at the hatch on the portside. I seen smoke was coming out of number 5 hatch and Mr. Radovich was alongside of me. So I hollered down below, I says, "Is anybody down below there?" I says, "There is no smoke; only there is a fire." So I didn't hear nobody answered me the first time. I sing out again as loud as I could, "Is anybody down below [142] there?" He says, "Yes." I says, "There is a fire." He says, "No; this is not fire; this is smoke from weld." I says, "No; this is a fire." You see? And I turned around and I says, "We must notify Fire Department immediately."

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)

Then I started shouting down again. Mr. Radovich took that hint and turned around and he went to notify the Fire Department.

Q. What did you do then?

A. What I do then, I was trying to find out—how many men was involved in the hold, but I can't—to me, it looked like somebody was working down in the hold, you see? But I didn't know before I went to the hatch. At the same time I glanced over the hatch, I see Mr. Protic standing there, and I asked Mr. Protic, "Did you sound the fire alarm?" He says, "Yes." "Did you brought a fire extinguisher?" "Yes." So, I hollered again, because already the fire become—the smoke become thick—I couldn't see the other side of the hatch, and I says, "Men, please come out of that hold. It is dangerous now, see?" And at the same time, while I was shouting down into the hold, there was three stevedores, they were removing the hatch tent. The hatch tent was covering, you know, that open hatch—after end of the number 5.

Q. After end of number 5 was open?

A. Was open.

Q. And you say there were stevedores there?

A. Stevedores were just taking off the hatch tent. [143]

Q. Were they aboard? Were they on board?

A. These stevedore bosses, they come from the dock. They were not aboard, but they come when they seen it, you know. So I had no time. My mind

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)

was on the fire and I didn't instruct them, anyway, they took the hatch tent off and they broke also the fire, you know—I mean the wire runner when they took that hatch tent down.

Q. Broke out the wire runner?

A. Wire runner, yes. So, by that time, the man come out of the hold, and he was in a daze, you know. He looked to me like he was wobbling when he came out of the hold and (interrupted)——

Q. How many? A. One.

Q. Just one? A. Yes.

Q. And at the time that he came out, was there any fire hose in the hatch?

A. While he was coming out of the hold, I told him, Mr. Protic, I says, "Let's get fire hose"—no, there wasn't fire hose in the hatch.

Q. Not at that time? A. No.

Q. But you had told Mr. Protic to break out the fire hose?

A. "Let's get the fire hose." I get it by the nozzle and [144] Mr. Protic opened the valve, you know, and I stretched the fire hose, you know, alongside of number 5 hatch, portside, and I said, "Ask for water on deck." He answered, "I already asked for water on deck." So I says, "All right." And I was right there and there was no water. I looked around and Boatswain is there, and I says, "Boatswain, go ahead and get the other hose." So I am right there with—the hose was in my hand, there was no water, because I couldn't go down in

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)

the hatch any more and there was only Boatswain who was the first—first one—and it must have been about maybe two, three minutes after I arrived, or maybe less, because I forget my wristwatch, you know, in a hurry, you know, and I wanted to rush to the scene of the fire as soon as I could. Now, then I left the fire hose there, to check, you know—rushed to the bridge and then over the pontoons and there was the Deck Maintenance Man Kotig (phonetic), with the other fire hose and then stand by. He says, "What's the matter, no water," he says. "I don't know."

Q. Now, where was he actually situated?

A. Forward end—forward end of the—the other man, Deck Maintenance Man.

Q. Forward end of number 5 hatch?

A. Number 5 hatch.

Q. On port or starboard?

A. Well, he was on the portside, if I can recall, sir. Portside. [145]

Q. Now, let me (interrupted)——

A. Starboard side—starboard side.

Q. Now, let me make sure I have this correct now, Mr. Kand. The hose that you and Mr. Protic led out, was that from the hydrant just forward of number 5?

A. No; that is aft—that was number 11 hydrant.

Q. I see. All right.

A. On the portside.

Q. Now, where was the Deck Maintenance?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)

A. Forward end on the (interrupted)——

Q. On the starboard side?

A. On the starboard side.

Q. And did he have a hose led up?

A. He was—yes.

Q. And where did that hose come from? What hydrant?

A. That hydrant come from number 9, forward end of the number 5 hatch.

Q. I see.

(Whereupon, a blank sheet was marked Coast Guard Exhibit 3.)

Q. Now, Mr. Kand, handing you a blank piece of paper which has been marked as Coast Guard Exhibit 3, I will ask that you sketch an outline of the vessel; and now, if you will indicate thereon, the location of the various hatches and the deckhouse? A. (Indicating on sheet.)

Q. And if you would number those for me, please—the hatches? [146]

A. (Indicating on sheet.)

Q. Now, if you would indicate thereon, using the letters A, B, C and so on, the location of the hydrants? And I am interested at the present only in those hydrants located on the main deck. Make that the letter A. A. (Lettering on diagram.)

Q. Make this the letter D as in dog. Now, are all of these hydrants located on the main deck—on the weather deck? A. Yes.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)

Mr. Wood: Commander, I don't know whether you want the interruption now or later. The Captain here thinks he has misplaced one of those hydrants. If you want him to suggest a correction now, all right; if not, all right.

Lt. Cmdr. Mason: Yes; let's have the suggested correction. What is it?

Mr. Winterling: Mr. Kand, the two there—isn't this D, isn't that right forward of the midshiphouse rather than forward of (interrupted)——

A. Oh, yes, yes, yes, yes, yes, yes, yes. (Indicating on diagram.)

Lt. Cmdr. Mason: Let the record show that the witness has been handed a paper with the sketch outlining a vessel and indicated thereon, the foc'sle and the midshiphouse and five squares representing the cargo holds. This document will be marked as Coast Guard Exhibit 3. The former document will be [147] destroyed. Now, I will ask the witness if he will indicate thereon, the holds by number. You do it all over again. Make a large outline of the vessel and you draw it in.

(Diagram made by witness.)

Q. Now, if you will indicate thereon by the letters A, B, C and so on, on the location of the hydrants. A. (Lettering on diagram.)

Q. Now, referring to the letters which represent the hydrants aboard ship as noted on Coast Guard

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)

Exhibit 3, which hydrant was the hose led from that the Deck Maintenance Man was standing by?

A. (Indicating.)

Q. Indicating the letter F?

A. (Affirmative nod.)

Mr. Wood: F?

Q. F. Now, which hydrant was the hose led from that you were standing by?

A. (Indicating.)

Q. Indicating the letter G?

A. That's right.

Q. Do you know whether any hose was led from hydrant E? A. No.

Q. There was none led from hydrant E?

A. No.

Q. Was there a hose on the bulkhead or in a bracket in the [148] vicinity?

A. There was a hose, but I think they took that hose, you know, for an extra hose for the number 5.

Q. I see, as an extension for (interrupted)——

A. As an extension.

Q. From which hydrant?

A. That is what I can't recall. I was too busy. I can't recall, sir.

Q. I see. Now, I believe you stated earlier that the Bos'n assisted in the rigging of the hoses, is that correct?

A. Boatswain didn't assist. We had already hose rigged, and Boatswain come alongside of me, and I told him, I says, "Boatswain, go ahead get other fire alarm—or fire hose."

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)

Q. I see. Now, normally, you would have gone on watch at midnight, is that correct?

A. That's right, sir.

Q. Now, after the man came up out of number 5 hold, what did you do next?

A. The fire hose was connected; the engine room was informed for water on deck, and I stood by, just to get water, you know, to shoot at the fire, as quick as I could.

Q. Now, how long did you stand by there?

A. It must have been several minutes, because smoke was very intensive at that time, and waiting for the water and so forth, it turned to my imagination, at first, when I went there, I [149] thought it was the paper, but then, you know, when the smoke was intensive, I know, you know, that it was the general cargo in the lower hold. And I still did not get results from the fire pumps, so I said, "Something must be wrong."

Q. Who did you say that to?

A. I didn't say—there was nobody else. I thought to myself. There was nobody else there. Maybe Protic was on the other side, but smoke was so intensive I couldn't see him. I said, "I am going to check on it," so I rushed over, you know, on the pontoon, stepped on the pontoon, and there was this Kotig with a fire hose. I said, "That's good," I says, "You stand by here and we will get some more men." I rushed on the bridge and sent other general alarm in, grabbed the phone, phoned down

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)

into the engine room, and I said, "What is the matter, there is no water on deck?" It must have been about two, three or four minutes, I don't know, because I didn't have no wristwatch. "Why, there is water on deck a long time ago." So I rushed back.

Q. Is that what they told you, that there was water on deck a long time ago?

A. Yes. I don't know who answered me, you see?

Q. I see. A. That's right.

Q. Now, you say when you ran up to the wheelhouse this time, you rang the general alarm? [150]

A. Again.

Q. The fire alarm? A. Yes.

Q. Had anyone arrived before then?

A. Yes, Mr. Protic.

Q. Then when you went back—then when you left the wheelhouse, you went back down to the scene?

A. I went back to the scene, but first, I stepped in the Chief Mate's room. It was in my mind, you know. I know that it was general cargo, but maybe that is some oil, inflammable. I glanced—I know the location of the cargo, and I know, you know, the cargo plan; so I looked, you know—I know exactly what I look for because I am familiar with the cargo plan. There was, what you call jute in the bags and then some construction papers. And I looked, and no, there is no inflammables, so I rushed on the scene and by that time, I heard fire engines coming.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)

Q. Somebody called this out, did they?

A. Yes.

Q. Or you heard the fire engines yourself?

A. Yes, and then somebody called my attention again. I don't know this, you know. He says, "The wire runner is broken." That must have been Boatswain. I says, "That's all right," I says, "We are not interested in the runner now," I says. He thought we wanted to fix up the wire runner and put the [151] pontoons on or something like that. I says, "No," and then the boats or firemen came aboard—shore firemen.

Q. And did they bring hoses aboard with them?

A. Immediately.

Q. And they got their water from where—ashore? A. Ashore and fire boats.

Q. And as I understand, fire boats also came alongside? A. Fireboats came alongside.

Q. Did the fire boats come after the trucks—the fire trucks?

A. I think it was a little later, because I contacted, you know, the fire boat Captain, he asked me about the cargo, so I told him as far as I knew there was no inflammable cargo there. I know we only had jute and so forth, and they says, "Can you show me a manifest?" I says, "Yes, I am going to look in the mate's room," and also a cargo plan. Look in the cargo plan under what they call a cargo key, it is computed in a manifest—what it contains and so forth—I says, "Here it is." Started first,

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)
you know, and I said, "No, that's the Los Angeles cargo, that's Portland cargo, and most likely this stuff come aboard in Boston—let's look at the Boston first." And it checked with the same thing that I told him—nature of the cargo.

Q. Now, when you first looked down into the cargo hold, when you first came aft—— (interrupted). [152] A. Yes.

Q. ——was there so much smoke that you couldn't see anything down there?

A. It was so much smoke I could see faintly the man was standing on the paper and it was so rapid—spreaded so rapid that I couldn't see the man any more.

Q. Could you see any flames?

A. No, I didn't see no flames—no, I didn't see no flames.

Q. Did you know what that man had been doing down there?

A. When I shout down first, "Is anybody down there?" He says, "Yes." I says, "There is a fire." He says, "No, that's smoke from a weld." I says, "No, this is not a welding smoke; this is a fire."

Q. Were you aware that there were to be any welding repairs aboard the ship?

A. I was not.

Q. Were you aware that there was a ladder rung missing from the ladder? In that hold?

A. Yes, I was.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)

Q. How did you become aware of this?

A. I was aware because it happened on the previous week discharging cargo out of number 5 lower hold; and I am assigned on the duty as a Third Mate to watch cargo discharging and loading in number 5 and 4 holds; and I know as I make an inspection every morning, and in fact, at about 11:45, I [153] noticed ladder rung was missing.

Q. Now, this was when?

A. That was, I think previous Friday. I can't recall, but I think it was previous Friday.

Q. I see.

A. I made also a stevedore damage report up, went down and looked at the rung and told the carpenter, I said, "Go ahead and put safety rung, maybe somebody got hurt," and it was the fifteenth ladder rung in forward end, leading from shelter deck to lower hold.

Q. And did he put on this temporary ladder rung? A. Yes, sir; he did.

Q. And—— (interrupted).

A. The carpenter, he put the rung on.

Q. And did you report this missing rung to anyone then?

A. I reported it to the Chief Mate and I also made a stevedore damage report.

Q. And that is submitted to who?

A. I submitted that first to one of the stevedore bosses and he signed, and then as soon as I contacted the Captain, you know, he also signed, and

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)

then I handed it, on the same day or previous day—I don't know but the mate was present at that time there—I says, "Here is your stevedore damage report." I put it in an envelope, mailed ashore to the marine superintendent in San Pedro, one I delivered to the stevedore boss [154] who was present there and I delivered copies of stevedore damage report to the Chief Mate.

Q. Now, how soon after the fire did you go down into the hold, or did you go down at all?

A. I went down there.

Q. When was that? When was the first time after the fire?

A. That was the first time, after the fire, when I come on duty, on at midnight. One thing—— (interrupted).

Q. I see, and—go ahead.

A. One thing I couldn't do it right away, was in my mind, when I come out of my room, I didn't have no clothes to speak of on, you know. You see, I come out with a shirt and the firemen that was putting the water in the hold, they put the water on me first, so I got thoroughly drenched, so I was after fifteen minutes, you know, still operating as much as I could, you know, and the fire, there was various things to do, lift the pontoons off and so forth, so I became chilly, and I went, you know, and took a bath.

Q. Now, when you did go down in the cargo hold after you came on watch at midnight, was the

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)
temporary ladder rung that you had had installed a week before, in place then?

A. No, I know this ladder rung was missing, and I instructed Mr. Protic, Junior Third Mate, I says, "I see the ladder rung what we put on in San Pedro is missing." I says, "Be sure, you know, go ahead, yourself, or instruct somebody else, [155] you know to put the ladder rung on there." And I came back in at midnight, I see the ladder rung was there. That was a new one put by Mr. Protic.

Q. It was not the same one that you had installed earlier? A. No, it wasn't, no.

Q. Have you had opportunity since the fire to examine the area of the ladder where that rung is missing, thoroughly?

A. Not immediately after—but after when I am on the midnight watch.

Q. And did you look to see if there was any signs of burning or welding in the—— (interrupted).

A. I couldn't see any signs of welding no, because—— (interrupted).

Q. Have you since checked at any later time to see?

A. No, because I am not expert. I couldn't check it very well.

Q. Now, had you already reached number 5 hatch when the fire alarm was first sounded?

A. Yes.

Q. You had?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)

A. Yes. I heard when I come down by number 4 hatch, I heard, you know, fire alarm, and then I didn't hear any more when I come by number 5.

Q. I see, was that pretty much immediately after you arrived at number 5 then? [156]

A. It was—I heard fire alarm before I went to number 5. Just when I was on the way and then I got to number 5, I didn't hear the sound any more.

Q. Now, what was your purpose when you went up in the wheelhouse later to sound the fire alarm again?

A. That was—audible alarm was going continuously, so I was so hurry, I said, "Christ, I see the lights there all right, but what is keeping that fire alarm continuously, but it don't sound," but there was one thing again, and I wanted more men. I didn't see no more than about four, six crew there, see, so I am going to give another blast, and at the same time to inquire, "What's the matter with the pumps, we don't get water?"

Q. I see.

A. Then I came back from there and bounced anybody's door, you know, like from the starboard side, to be sure, you know, we got as much men as we can.

Q. And did you observe many more men arriving at the scene? A. Yes; yes.

Q. And do you recall who they were?

A. I would say there was the Boatswain, Kodig

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)

and the other Deck Maintenance Man, and there was two ordinary seamen for sure. I was handling myself, the pontoons—taking the pontoons off so to facilitate the shore firemen better.

Q. I see.

A. There must have been about six or seven or eight men, you [157] know, of the deck force at that time.

Q. Now, at any time, did you observe a fire extinguisher at the scene? A. Yes.

Q. When was that?

A. That was shortly after I arrived, you know, alongside number 5 hatch on the port side. I seen Mr. Protic with the fire extinguisher through the smoke.

Q. I see. Do you know what type of extinguisher that was? A. Soda acid.

Q. Soda acid extinguisher?

A. Yes, because as far as I could see it was soda acid.

Q. When you peered in the Chief Mate's room, checking on cargo, is this what you observed?

A. Yes, cargo plan.

Q. Let the record show that I have handed the witness a profile sketch of a cargo plan for the S.S. Robert Luckenbach, which was handed to this Investigating Officer on board the Luckenbach the day following the fire by the Chief Officer. Now, I wonder, Mr. Kand, if you would describe the sketch

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)
now before you, indicating where the cargo was located in number 5 hold?

A. The cargo was located here in the wings of number 5 lower hold, port and starboard.

Q. Port and starboard—— (interrupted). [158]

A. Yes. That was in the fire.

Q. Next to the forward bulkhead?

A. Next to the forward bulkhead.

Q. And that cargo was what, sir?

A. That cargo was some paper—construction paper and jute in bales.

Q. I see.

A. Also was in midships, I mean—you know—midships was all general cargo, the majority was paper, mixed—I mean, I don't know how the layers were because I didn't stow that place. It was in the port wings and midships and also maybe some parts of machinery, I can't recall exactly.

Q. And what is the blank area of this sketch which is the lower campartment directly below number 5? A. Deeps.

Q. That is a deep tank? A. Yes.

Q. To your knowledge, did it contain any liquid?

A. Not to my knowledge, no.

Q. I see. And what is forward of the bulkhead of number 5 hold?

A. Forward bulkhead of number 5 hold is—constituted masthouse on deck.

Q. Well, forward of the bulkhead would be num-

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)

ber 4 hold, and what is located therein just forward of that bulkhead—what cargo? [159]

A. It is cocoa, cartons of lamps, candy, Hershey bars.

Q. Now, after the Fire Department arrived at the scene, did you render any further assistance yourself? A. I did.

Q. You did not?

A. I did. I can't recall his name—was Post or something, some short name, Fire Chief. As soon as I see him, I asked him what he wants me to do. They put the hoses there and there was at least twenty or so men aboard and they put the hoses in the hold and he says, "Try to get the hatch pontoons off." I says, "Yes." So I says—the Boatswain was around there, and I said, "Boatswain," I says, "We have got to get the hatch pontoons off immediately." So they had the hoses going into the seat of the fire and they got the hatch under control.

Q. Now, they were removed by the ship's force?

A. Ship's force, yes.

Q. I see, and then after that, did you stay up and about the decks?

A. Yes, I stood up by the decks.

Q. You did? A. Yes.

Q. Did you remain up until it was time for you to go on watch at midnight?

A. No, I didn't remain, but I got shivering. I also took the hatch pontoons off from number 4, so I seen the fire was, you [160] know, in the hands

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)

of the firemen. I gave the best possible assistance I could and I also spoke, you know, to the Master of the fire boat. The fire boat was there so he took me up, you know, to the Chief Mate's room and we checked on the cargo plan and on cargo key or computed mainfest, so I become shivering. I was cold, you know, I was drenched wet, you know, see? So I decided, I told Mr. Protic, I said, "Everything is under control now, the fire is going fine," I says, "I feel like maybe I am going to get sick. I am going to take a bath." After maybe about fifteen minutes, I took a hot shower, you know, and I come on deck again, you know, and spoke to Mr. Protic and so forth, and everything is under control now. Nothing I can assist any more.

Q. I see. Now, when you came on watch at midnight, was the fire entirely extinguished at that time?

A. The fire was extinguished except the bales of jute, what they were taken out and loaded on the barge on the starboard side, you could see still, you know, smoldering.

Q. I see.

A. And firemen were working and putting, you know, fire hoses—water hoses on deck on the fire—on the bales, in other words, but still was smoldering and you could see the spark of the fire on a few of them.

Q. And then did you maintain a fire watch at the scene until the following morning? [161]

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)

A. I was there at all times; at all times.

Q. I see. Was any action taken through your night watch or morning watch to pump out the number 5 hold of water? Do you know?

A. It was—when the fire was under control, I contacted ship's carpenter and says, "Let's sound the holds." So he come up to me and sounded the cargo holds and there is approximately thirty inches of water, see? So I says, "We will notify the engineer, you know, to pump it out." He says, "They pump it out." And the night I am on the watch, I consulted the Chief Mate as they were pumping out, but I don't see no degrees of water. I went down there and I stick a stick in there and there is still approximately thirty inches of water in number 4 and it looks to me like a little less in number 5; and they were pumping—I met the engineer and I asked him, "Were they pumping," and he says, "Yes," but it seems to be there is nothing decreasing, I says, see. There is nothing increasing, either, so there is no danger, there is no hole in the ship, see?

Q. Now, had the Chief Mate been ashore during this fire? A. Yes; he had been ashore.

Q. And do you know when he came back—was it on your watch?

A. No; it wasn't on my watch. He was aboard already before.

Q. Some time before midnight then, he returned?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)

A. Some time before midnight, yes. [162]

Q. Now, is there anything else that you would care to add, Mr. Kand, that might prove pertinent to this investigation, or anything at all you feel you would like to add, that hasn't already been asked?

A. I do not know. I do best possible thing I could; I gave assistance, I tried to get the water, you know, the hoses ready and stand by there, the nozzle was in my hand, couldn't get no water and then when the firemen arrived, you know, I gave best possible assistance, you know, to the Fire Chief.

Q. At any time did you finally get water to the ship's hose? A. No.

Q. You did not. Where is the hose for hydrant G normally stored aboard ship?

A. The hydrant on the hatch is—what they call escape from fire room, you know, it is alongside of there. If I can recall that is (interrupted)——

Q. Escape hatch? A. Yes.

Q. Is it on a bracket?

A. Yes; it is on a bracket on the side.

Q. There is one—specifically now, the hose as located at hydrant F as shown on the exhibit, is the hose that the Deck Maintenance Man had, is that correct?

A. Yes; he was standing by with that hose.

Q. Now, outside of that hose and the hose that you had charge [163] of from hydrant G as indicated on Exhibit 3, was there any other hose that you observed in the area?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)

A. Not at that time.

Q. Not at that time?

A. Not at the time.

Q. Is it possible that a hose might have been led from hydrant E and already been into the hold and you did not observe it?

A. Not what I don't know and I didn't see no hose hanging into the hold when I rushed to the scene.

Q. I see.

A. The fire, it was still not too dim, I can't (interrupted)——

Q. Now, let me ask you this: Do you know whether or not the hose from hydrant F, that was in the hands of the Deck Maintenance Man, was led down into the hold before the man in the hold came out?

A. Not that I can recall (interrupted)——

Q. You don't know?

A. ——because I went to the portside, see, and I met the Deck Maintenance Man right here (indicating). I went like this (indicating)—I jumped on the pontoons like that, and the smoke was so intensive already I couldn't notice at that time, you see, in this side.

Q. You couldn't notice whether the hose was down in there or not? [164]

A. No; I couldn't—yes, I couldn't; no.

Q. You did state, Mr. Kand, that you were able to make out a man down in the hold?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Anthony Kand.)

A. Yes.

Q. Was it clear enough for you to establish whether or not he had in his hand, when you first saw him, or at any time prior to his leaving the hold, a fire hose?

A. No; I didn't see no fire hose. I seen his face very distinctly. He was a big fellow with a red face, and I said, "What are you doing there?" And he says, "This is no fire," he insisted, "No fire—it was fire from weld." See? "How many men you got there?" He didn't answer me. I was anxious to know how many men was there, you see? He didn't say.

Q. Now, did he come up out of the hold before you left to go up to the wheelhouse?

A. Yes, yes. I stand by with the fire hose maybe two more minutes. He didn't spoke to me, but he looked dazed.

Q. I see.

A. And he went just by me; he didn't stop. Over the gangway he went.

Q. Do you have anything further that you care to add, Mr. Kand? A. No; I haven't.

Lt. Cmdr. Mason: Very well. Thank you, very much.

(Witness excused.) [165]

Respondent's Exhibit No. 23—(Continued)

GEORGE ALBERT HEBERT

was called as a witness by the United States Coast Guard and, first having been duly sworn, was examined and testified as follows:

Examination

By Lt. Cmdr. Mason:

Q. Will you state your full name and address, please?

A. George Albert Hebert; 136 Margueritte Avenue, Mill Valley, California.

Q. Now, Mr. Hebert, you are a licensed engineer in the United States Merchant Marine, is that correct, sir? A. I am.

Q. And referring to the crew list for the recent voyage of the Robert Luckenbach, which I have now before me, I notice that your license number is indicated thereon as 199 787—would that be correct, sir? A. That is correct.

Q. And you are presently employed as Chief Engineer on board the Robert Luckenbach?

A. I am.

Q. And how long have you been serving in a licensed capacity in the Merchant Service, sir?

A. Since 1945—October.

Q. And how long employed with the Luckenbach firm? A. Since 1946.

Q. And you have been aboard the Robert Luckenbach for how [166] long?

Respondent's Exhibit No. 23—(Continued)
(Testimony of George Albert Hebert.)

A. Approximately five years.

Q. Have you served all of that time in the capacity of Chief Engineer?

A. No; I haven't. I have served most of the time as First Assistant. I am now relieving the Chief Engineer.

Q. I see. You say you are now relieving the Chief Engineer. Were you the Chief Engineer on the evening of 2 April when the fire casualty occurred? A. I was.

Q. Had you made this recent voyage with the vessel? A. I had.

Q. And that was in the capacity then of First Assistant, would that be correct?

A. I went Chief Engineer on, I believe, the 28th or 29th of January.

Q. I see. Now, were you on board on the evening of 2 April, when the fire occurred?

A. I wasn't.

Q. Where were you at that time?

A. I was ashore.

Q. And when had you left?

A. About 5:20, 5:25—between 5:20 and 5:30, I would say.

Q. I see. Had you left any particular instructions with any of your subordinates prior to leaving the vessel? [167] A. No; I hadn't.

Q. That is, with respect to any repairs or operating instructions? A. No, sir.

Respondent's Exhibit No. 23—(Continued)
(Testimony of George Albert Hebert.)

Q. And what was the status of the vessel at the time of your departure? Were the engine secured?

A. The engines were secured.

Q. And you were on ship's power?

A. That's correct.

Q. When did you first become aware of the fact that a fire had occurred on board?

A. I returned aboard between 11:30 and 12:00 o'clock, and I seen the fire trucks.

Q. Now, prior to the fire, had you made any arrangements whatsoever, relative to the repairs to be made to the vessel or its machinery?

A. We had certain repairs by the shipyard going on.

Q. And was this the result of jobs submitted by yourself?

A. Yes; outside of the survey of number one generator, which was part of the survey.

Q. I see. Now what, specifically, were the original—particular jobs that you had originated?

A. One was to renew a section of fire line, and the other was to repair hinges on the icebox door.

Q. What was wrong with the section of fire line? [168]

A. It had developed a leak at sea, which I had plugged.

Q. Had this developed just during the recent voyage?

A. Yes—well, no; on our way to San Pedro.

Q. That would be about when?

Respondent's Exhibit No. 23—(Continued)
(Testimony of George Albert Hebert.)

A. I'd say about two weeks.

Q. And you plugged it how?

A. I tapped a hole in the line and threaded it and put in a plug.

Q. I see. Now, is this a four-inch line?

A. I believe it's five inches.

Q. Five inch. And where, specifically, is this line located, and what purpose does it serve?

A. It's located in the engine room, about the same deck as the main deck, and it feeds the main fire line on deck.

Q. In other words, it is, then, a discharge line from the fire pump? A. Yes; it is.

Q. What kind of fire pump do you have?

A. Two centrifugal electric pumps.

Q. And they're both tied into the same main, are they? A. They are.

Q. And the fire main is a single line system then, I take it? A. It is.

Q. With risers throughout the ship to the hydrants? A. That's correct. [169]

Q. Now, does the removal of this particular section of fire line cause the entire fire fighting system to become inoperative or is it still possible to use the system?

A. The entire system would be inoperative.

Q. In other words, neither one of the centrifugal pumps would then be able to furnish water on deck?

A. That is correct.

Q. Now, prior to your going ashore on 2 April,

Respondent's Exhibit No. 23—(Continued)
(Testimony of George Albert Hebert.)

had this line been removed? A. Yes; it had.

Q. Who had removed it?

A. Albina shipyard workers.

Q. I see, and was that under your supervision, or was it strictly under the supervision of the Albina force? A. Albina force.

Q. Were any of your members of the "black gang" present to assist during this job?

A. Yes; the First Assistant—I believe the Second Assistant drained the line for them, so they could remove the line without water.

Q. I see, and do you know approximately what time that line was actually removed?

A. It was in the afternoon, I believe. I'm not too sure actually what time it was.

Q. And was it intended, then, to take that line to the shop [170] in order to fabricate a new one from it? A. That is correct.

Q. To use it for its measurements and so forth?

A. That's correct.

Q. I see. And while it was removed, were there any blanks put into the lines?

A. There were blanks put on the top and the bottom.

Q. I see. Now what, if any, arrangements were made, insofar as water facilities from the dock to replace the absence of the use of the fire pumps?

A. I had made no arrangements, but I was under the impression that after they blanked it off they would connect the shore line to the system,

Respondent's Exhibit No. 23—(Continued)
(Testimony of George Albert Hebert.)
and the blank being on the bottom gave me service —fire protection—in the engine room. That was the purpose of this blank on the bottom of the line.

Q. I see. In other words, you did have water then to an engine room hydrant?

A. That's correct.

Q. But the line being removed and blanked off at the other end prevented water from going topside? A. That's correct.

Q. And, ordinarily, when hooking up to shore water facilities, such as when it's a "dead ship," where would this connection be made?

A. On the after end of the house there is a connection—a [171] shore line connection—for the fire main on both sides of the ship.

Q. And would this be fire hose hooked to this connection?

A. No; it's a standard fire hose connection.

Q. I see. So, in other words, it would be a matter of rigging fire hose from the shore hydrant up to that connection? A. That is correct.

Q. But that is not one of the hydrants, is it?

A. No; it just feeds.

Q. Now, prior to leaving the vessel that afternoon, did you check to see whether or not this hose had been rigged? A. I did not.

Q. Now, I'd like to have you describe just a little as to just the procedure that you go through in connection with having a repair job done. In other words, you make out a list of the jobs you desire

Respondent's Exhibit No. 23—(Continued)
(Testimony of George Albert Hebert.)
having done in your department, and then submit them to someone?

A. I submit them to the Port Engineer.

Q. And in this case, that would be who?

A. Mr. Sterling.

Q. I see. And then—this was in writing?

A. Yes; it is.

Q. Do you notify anyone else, such as the Master or the Chief Mate?

A. No; I do not. [172]

Q. In other words, your contact is directly with the Port Engineer? A. That's correct.

Q. And, in this particular case, did you submit that request in writing? A. I did.

Q. And did he make any acknowledgement of the fact that the work would be accomplished for you?

A. He did.

Q. Did he state when the work would start?

A. Yes, he did—approximately. He said it would be on April the third, I believe.

Q. In other words, it was actually intended to be started yesterday, rather than the date of the second? A. April the second was the day.

Q. I see. Well, let me put it this way to you. Was it scheduled, according to him, to be started on the day that it actually was started?

A. That's right.

Q. Which was the second of April?

A. That's right.

Respondent's Exhibit No. 23—(Continued)
(Testimony of George Albert Hebert.)

Q. How were the fire pumps themselves? Were they in good working order?

A. They were in good operation. They were passed in recent months by the American Bureau and the Coast Guard on the East [173] Coast.

Q. I see. Now, you have no idea just when that section of line was actually removed?

A. Not in hours, I don't.

Q. But it was some time in the afternoon before you went ashore? A. Yes, it was.

Q. And did they take it right off the ship?

A. I believe they did.

Q. Has it since been replaced?

A. It has.

Q. When was that done? A. Yesterday.

Q. Yesterday. Was the vessel in drydock?

A. The vessel is not in drydock.

Q. It's not in drydock; I see. It's still at Luckenbach Terminals. Have you had opportunity or occasion to test the fire system since the installation of it? A. I tested it myself.

Q. When was that?

A. I would say about four o'clock yesterday afternoon.

Q. And was it in proper working order?

A. It was.

Q. Did you have any welding repairs to be accomplished on the ship? [174] A. No.

Q. What type of fire fighting system does the—is the vessel equipped with—other than the fire

Respondent's Exhibit No. 23—(Continued)
(Testimony of George Albert Hebert.)

hydrants? A. CO_2 system.

Q. And what type of CO_2 system is this; are you familiar with that?

A. I believe it's a Kidde-Walker.

Q. Kidde-Walker. And what is the extent of the equipment that the vessel has in this connection? In other words, are there separate lines to each of the cargo spaces? A. There are.

Q. And where is the main CO_2 supply?

A. It's on the deck below the main deck, on the port side—the CO_2 room.

Q. I see. Do you know offhand how many bottles and quantity of CO_2?

A. Seventy-six bottles—over seventy-six; around there.

Q. What is the capacity of those bottles?

A. Well, it all depends on the cargo they have in the holds. It's on a chart on each side of the manifold as to how many bottles to use in that certain area, depending on how much cargo there is in the hold.

Q. I see. And was this equipment in good operating order? A. It was.

Q. And does that CO_2 system come under your department for [175] maintenance and repair?

A. It does.

Q. And where are the controls for this system activated from?

A. On the main deck there is a manifold to con-

Respondent's Exhibit No. 23—(Continued)
(Testimony of George Albert Hebert.)
trol the forward part of the ship, and—— (interrupted).

Q. On the main deck, where?

A. On the port side—forward port side.

Q. I see; of the deckhouse?

A. Inside; inside the passageway.

Q. Oh, I see.

A. And it's on the same deck on the starboard side aft, for the after part.

Q. I see. Is there any other place for activating its operation? A. No, they are the only two.

Q. There isn't any, for example, in the pilothouse? A. No, no control in the pilothouse.

Q. Now, I believe you stated that you had no occasion to report the repairs that you were to have accomplished, to anyone other than Mr. Sterling? A. That is correct.

Q. Was the Master or the Chief Mate informed by you of the fact that the fire main system would be placed out of operation during this period?

A. No, it wasn't. [176]

Q. Was anyone other than Mr. Sterling advised that the fire main system would be out of operation for awhile?

A. My First Assistant and Second Assistant.

Q. I see. Do you know, yourself, whether or not they informed anyone in the deck department, such as the Master or Chief Mate, of this?

A. I don't believe they did, sir.

Q. Was it the Albina force that accomplished the

Respondent's Exhibit No. 23—(Continued)
(Testimony of George Albert Hebert.)

installation of the new replacement section of the fire main? A. Yes.

Q. Was this under any ship supervision?

A. No.

Q. Had you been advised as to how long you might expect the fire system to be inoperative during this repair?

A. As far as—to my knowledge, I assumed they would connect that fire line to the dock. I had no idea that we were without fire protection.

Q. No, I believe you may have misunderstood me there. Were you advised as to approximately how long the repair would take, though?

A. How long before they could return the line?

Q. That's right.

A. It would be the next day then.

Q. The following day from the day they removed it? A. That's right. [177]

Q. I see. And as I understand it, this particular job did make the entire fire main system inoperative, with the exception of engineroom space?

A. Section of engineroom space and a couple of smaller stations—inch and a quarter stations on the port side—on the third deck, I believe, inside the passageway.

Q. Now, when you first returned to the vessel, which I believe you stated to be at about midnight—— (interrupted).

A. That's correct.

Respondent's Exhibit No. 23—(Continued)
(Testimony of George Albert Hebert.)

Q. Was there any shore connection for water facilities hooked up to the vessel at that time?

A. There was.

Q. There was. And how did you happen to ascertain this, did you observe it, or ask?

A. As I came aboard, I saw the Captain by number five hatch, and his first question to me was "Why didn't they have water on deck?" and I went over and looked and seen that the connection was made, so I went and seen the First Assistant, and I said "Was the connection there, or did you make the connection, or what happened?" and he said he had made the connection when he returned to the vessel after the fire started, about 7:20 or something like that.

Q. In other words, he told you that he, himself, had made the connection about 7:20 or shortly thereafter? A. That's correct. [178]

Q. Now, whose responsibility is it on board, to see that fire water protection is maintained at all times?

A. I would believe that is my responsibility.

Q. In other words, then, in this particular instance, you feel that it was your responsibility to have assured that there was shore water while that section of pipe was out?

A. I was certain they had made the connection; I did not check it.

Q. Did anyone report to you that they had?

A. No. At the time, we had this number one

Respondent's Exhibit No. 23—(Continued)
(Testimony of George Albert Hebert.)

generator being opened up, and my time was spent checking it.

Q. Have you had any previous experience or reasons for hooking up to shore facilities at Luckenbach Terminal in the past?

A. I don't understand the question.

Q. Have you at any time had to hook up to shore facilities—water facilities—at the Luckenbach Terminal at any previous time?

A. Not that I can recall. Not for fire protection.

Q. I see. I mean, there has been no time while aboard this particular vessel, that you've had to secure the fire main system and use shore facilities at the Luckenbach Terminal?

A. Not at this Luckenbach Terminal.

Q. I see. Are you familiar with what facilities are available to the vessel as far as water is concerned at that [179] terminal? A. Yes, I am.

Q. Are there hydrants available on the pier?

A. There is a hydrant.

Q. There is. Do you happen to know, offhand, what pressure is normally maintained at those hydrants?

A. No, I would judge about fifty pounds; sixty pounds.

Q. Adequate for purposes of a standby system in the event of a shipboard failure? A. Yes.

Q. What I am attempting to determine here, is if, in your opinion, the terminal facility itself, was lacking insofar as equipment available to the ship

Respondent's Exhibit No. 23—(Continued)
(Testimony of George Albert Hebert.)

for fire fighting. Now, I believe you stated that you had submitted no job order which required any welding, is that correct? A. That is correct.

Q. Were you aware of any other job orders submitted by any other department head, that would have required welding? A. No, I wasn't.

Q. Did anyone, such as the Master or Chief Mate indicate to you that welding was going to be performed while in this time—while the vessel was in?

A. I believe they mentioned something about a "Uni-Strut"; he didn't say when he was going to do it.

Q. I see. Did Mr. Sterling mention anything to you relative [180] to welding to be done?

A. No.

Q. What type of fire pumps does the Luckenbach have?

A. Worthington electrical centrifugal pump—two of them.

Q. Worthington electric. Now, when you returned back aboard, what engineer was on watch at that time? A. Mister Elixson.

Q. And he is the—— (interrupted).

A. Junior Third Assistant.

Q. Junior Third Assistant. And you conversed with him almost immediately, did you?

A. No, I did not.

Q. You did not?

A. No, I was concerned—I went down in the engineroom afterwards to see if water they were

Respondent's Exhibit No. 23—(Continued)
(Testimony of George Albert Hebert.)
putting in the after hold was flooding the shaft alley. I observed the bilge pumps were handling it adequately, and I came up again.

Q. I see. Did you talk with Mr. Elixson at all that evening? A. No, I did not.

Q. Did you arrange for further pumping out of number five at a later hour, after you returned to the ship?

A. No, our pumps were handling it adequately, and I would have been informed if they were losing out.

Q. I see. Well now, I was aboard the vessel the day following [181] the fire, and I observed that there was still considerable water in the number five, and I was just wondering whether the pumping was still going on at that time.

A. The next day?

Q. Yes.

A. Yes. It was draining slower, though, because the—evidently the rose boxes were getting—— (interrupted).

Q. The strainers were getting clogged?

A. That's correct.

Q. I see. Now, Mr. Hebert, is there anything you would care to add, or anything you feel might be pertinent to this investigation, that I have not already brought out in my questioning of you?

A. No.

Q. Mr. Hebert, to your knowledge, was there any

(Testimony of George Albert Hebert.)
Respondent's Exhibit No. 23—(Continued)
shore connection hooked up to the vessel to furnish water of any type, such as fresh water, to the vessel?

A. That is correct.

Q. There was? A. There was.

Q. What was this connection?

A. This was connected to the line on the dock.

Q. And—the line on the dock furnishing water to what?

A. To the—well, at that time, I believe the First Assistant was filling the forepeak tanks. [182]

Q. This was for the fresh water supply?

A. That is correct.

Q. And would that situation, then, offered adequate pressure on board that a fire hose might have been hooked up to some other connection on the ship? A. I believe so.

Q. Where, for example, might they—might a hose have been rigged?

A. Well, it would have been necessary to put a "Y" on the line.

Q. On what line? A. On the fire line.

Q. I see. You mean take it directly from the shore line, then? A. That's right, yes.

Q. I see. Was there any outlet on board ship where a fire hose might have been hooked up, other than directly by a "Y" to the line coming from ashore? A. That I don't understand.

Q. Well, in other words, is there any outlet from the fresh water tanks, themselves, that you could have hooked up a fire hose to?

(Testimony of George Albert Hebert.)
Respondent's Exhibit No. 23—(Continued)

A. Oh, no; no, there isn't.

Q. There was not? A. No. [183]

Mr. Winterling: Commander, I want to know—I know most of our engineers on our various ships, and I don't think that anyone of them would deliberately leave a vessel in the shape where she didn't have water pressure, and I wonder if you could ascertain from the Chief, for my information only, if he thought the vessel was left without water, and if so, why did he think the vessel was left without pressure, or for what reason didn't he connect up the shore side line.

Q. When you—prior to your leaving—or at the time you were leaving the vessel, were you of the opinion, or were you not of the opinion there was adequate fire protection available to the ship?

A. I was under the opinion that there was adequate fire protection on the ship.

Mr. Wood: Commander, would you ask him how many hydrants and where they were on the dock and whether the hoses they had on the ship could have been attached to those hydrants directly?

Lt. Cmdr. Mason: If the hoses could have been attached to the—— (interrupted).

Mr. Wood: The ship's fire hose to the hydrants on the dock.

Lt. Cmdr. Mason: Before I ask that, though, could I ask what the purpose is there—in other words, if they're going to hook up to a shore hydrant, there will always be adequate hose connec-

(Testimony of George Albert Hebert.)
Respondent's Exhibit No. 23—(Continued)
tions—hoses in lengths—provided to make the connection [184] to the ship, and he has already indicated that there were shipboard connections, so what—I mean, I don't quite get the—what it would add to it.

Mr. Wood: Just a moment ago, the question was suggested, and you asked it, whether you could hook up this fresh water line to the ship's fire line in order to have a water supply in there. Now, there were hydrants on the dock, and the ship's hoses, if they fit, could have been applied directly to those hydrants and—instead of their waiting until the fire department got there.

Lt. Cmdr. Mason: Well, he's pretty much indicated that—that—as a matter of fact, that was the method that he had assumed was being handled by the contractor.

Mr. Wood: You misunderstand me. He had assumed that a fire hose had been connected to a shore hydrant and attached to the ship—to the ship's lines. Now, if that had been the ship's hoses—could have been attached right at the time the fire was discovered, to the shore hydrants, so that the water could have been taken directly from the shore, without running through the ship's lines.

Lt. Cmdr. Mason: I see what you mean. In other words, if they could then, when the fire first broke out, they could have taken ship's hoses down, hooked up to the dock and—— (interrupted).

Mr. Wood: They stood around for at least eight

(Testimony of George Albert Hebert.)
Respondent's Exhibit No. 23—(Continued)
minutes, according to testimony, with no water going on that fire. [185]

Lt. Cmdr. Mason: Well now, wait a minute. Let's be sure we're clear here. I don't recall that anyone "stood around" in the testimony, and secondly, I also recall that none of the witnesses were aware, at the time that the fire broke out, that there would not be water available to them, and they did make all the preparations of hooking up to the hydrant. Are you trying to assume—to state—that they are aware of the fact that there was no water to these hydrants?

Mr. Wood: No water came out of their hoses. This is my recollection of it: It took them about two to three minutes to get the hoses hooked up and the water turned on, if there'd been water in the fire line. No water came out. They called the engineroom and they said there'd be water pretty soon. Well, that same witness said it was five minutes later when the fire department arrived, and during that time no water went on there, and there were hydrants on the dock and they had fire hose on the ship. It does seem that that was a perfectly logical thing for them to do, however, I'm not—— (interrupted).

Lt. Cmdr. Mason: All right, but now, what is the question you want directed to the Chief? He isn't aboard at the time of the fire.

Mr. Wood: Whether the Chief knows whether the hydrants were on the dock, where they are

(Testimony of George Albert Hebert.)
Respondent's Exhibit No. 23—(Continued)
located—how close to the scene of the fire—and whether they had hose on the ship [186] that would have fit the hydrants on the dock.

Lt. Cmdr. Mason: I see. Of course, I was going to get the hydrant information from the—from Mr. Sterling, however, we can go through that merely to add to the information, yes.

Q. Mr. Hebert, are you familiar with the hydrants at the terminal where the ship was moored, such as to be able to describe where they were located in relation to the ship itself?

A. There is a hydrant right by the ship's gangway—well, within twenty feet of it, and it's a standard fire connection—two and a half inch fire connection.

Q. And are the hoses aboard the ship two and a half inch hoses? A. That is correct.

Q. I see, and were the couplings such on the ship's hoses that they would fit the hydrant on the dock?

A. That is correct. As I mentioned before, on my return to the vessel, the connection was made from that hydrant to the ship's hydrant. As I said first, this had been changed, and had the connection been in there—because that's the connection—I was under the assumption that it—that the contractor would make—and he told me "No," that he hadn't made the connection himself.

Q. Now, when you first went ashore, had the fire system already been secured? [187] A. Yes.

(Testimony of George Albert Hebert.)
Respondent's Exhibit No. 23—(Continued)

Q. It had been secured?

A. Yes, it was blanked off before the—prior to—— (interrupted).

Q. And then you went ashore and the hydrant being next to the gangway, did you or did you not observe that there was no hookup at that time?

A. I did not observe it. May I say, sir—by the gangway—our regular gangway—but in this port, the dock is level with the ship's side and we put in an auxiliary gangway, which is removed from that area.

Q. I see. Approximately how much hose would you anticipate would be needed for that connection, or how much was actually used?

A. I believe it was about two lengths of fifty foot hose.

Q. I see. Approximately a hundred feet, then, to span the distance? A. Yes, sir.

Q. Did you have anything further you wish to add, that hasn't been brought out, Mr. Hebert?

A. No, I haven't, sir.

Lt. Cmdr. Mason: All right, thank you very much, sir.

A. Thank you, very much.

(Witness excused.) [188]

Respondent's Exhibit No. 23—(Continued)

GUNNAR ELIXSON

was called as a witness by the United States Coast Guard, and first having been duly sworn, was examined and testified as follows:

Examination

By Lt. Cmdr. Mason:

Q. State your full name and address, sir.

A. Gunnar Elixson, 60 14th Street, Hoboken, New Jersey.

Q. And you are presently employed as Junior Third Assistant Engineer on board the SS Robert Luckenbach, is that correct, sir?

A. That's right.

Q. And were you so serving on 2 April, 1958?

A. That's right.

Q. What license do you hold, relative (interrupted)—— A. Chief's license.

Q. Chief Engineer? A. Right.

Q. Steam? A. Steam.

Q. Any diesel endorsements?

A. No diesel.

Q. And, according to the crew list for the last voyage, which I have before me here, your license is indicated as number 213 881, is that correct, sir?

A. I believe it is. [189]

Q. And how long have you been a licensed officer in the Merchant Marine, Mr. Elixson?

A. Since 1940.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Gunnar Elixson.)

Q. And how long have you been employed by Luckenbach?

A. Since December twenty-seventh of '57.

Q. I see, and has all that time been on board the Robert Luckenbach? A. That's right.

Q. Now, were you on board the vessel on the evening of 2 April, 1958, when the fire occurred?

A. That's right.

Q. What time did you go on watch?

A. About ten minutes to four.

Q. In the afternoon?

A. In the afternoon.

Q. And your watch was to (interrupted)——

A. Four to midnight.

Q. Four to midnight, I see. who did you relieve?

A. I relieved the Second Assistant Engineer; Mr. Porter is his name.

Q. I see. At that time did he give you any instructions with respect to any work going on or any operations that were underway?

A. No, just about the boilers and the taking on water. Q. Fresh water? [190]

A. Fresh water.

Q. Did he inform you as to any repairs being effected to the fire main system? A. No.

Q. Were you aware of any repairs being made to the system? Were there any workmen in the engine room? A. No.

Q. Now, during the period that you were on

Respondent's Exhibit No. 23—(Continued)
(Testimony of Gunnar Elixson.)

watch down there, did any workmen come down into the engine room to effect any repairs?

A. There were some working on the generator there—the number one generator.

Q. Now, at any time while you were on watch, did you become aware that the fire main system was inoperative? A. No.

Q. At no time. Did you spend your entire watch in the engine room? A. Yes.

Q. From four to midnight?

A. That's right.

Q. When did you first become aware that a fire was—had occurred?

A. About approximately twenty minutes to seven. That's a rough guess there. The Oiler—well, the fireman told me that the Oiler wanted to see me down by the fire pump, so I [191] went over there and he had the fire pump in operation, with all the necessary valves open and pressure on it. He told me that he was on his way up and one of the shore workers told him there was a fire in number five hold, so he went down to start the fire pump.

Q. Where were you at this time?

A. I was in the engine room some place.

Q. So he went down to start the fire pump?

A. He went down to start the fire pump.

Q. And then after he started the fire pump, did he report further to you?

A. No, he was—well, he was standing over by

Respondent's Exhibit No. 23—(Continued)
(Testimony of Gunnar Elixson.)

the fire pump and I went over there and I checked to see that everything was open and pressure on the pump.

Q. And then you received any word from topside that they weren't getting water?

A. I didn't get any calls myself, and then I think I ran up on the deck there and I saw somebody running around who said they hadn't got any pressure, so I went down further and I checked—I said "Everything is all right down below."

Q. What did you do then?

A. Well, I figured probably a hose off on deck or something; they were all okay down below there.

Q. I see, and did you later ascertain that there was a section of the fire main missing? [192]

A. Well, after while, when I—they were still running around, and still getting pressure, so I went up and started checking around and I saw that that section was blanked off, and in the meantime, they had the fire engines down there and firemen on the deck there and—well, they had water down in the hold there.

Q. Where is this section blanked off? Where is it located, actually, in the engineroom?

A. That's below one deck—you know—the main deck level.

Q. Is it situated over the main engine?

A. Over the main engine, yes.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Gunnar Elixson.)

Q. And, then, would it be midships or port or starboard?

A. It's over the engine room there—well, amidships.

Q. What is that, a five inch line?

A. Well, I couldn't say off-hand; it's all of five inch.

Q. I see. Do you recall an occasion earlier on the ship, where a leak had developed in that particular line?

A. Yes, on the Panama Canal they had a leak in there. They put a plug in it.

Q. Who discovered that leak, if you know?

A. I couldn't say; I wasn't (interrupted)——

Q. It wasn't on your watch?

A. I wasn't down there that time.

Q. You weren't? A. No. [193]

Q. You were still on the ship though?

A. I was on the ship, but I wasn't on watch.

Q. And do you know if any repairs were effected to it?

A. Well, from what I heard—hearsay—they put a plug in it or something; made a temporary repair.

Q. But you didn't know anything or have anything to do with it? A. No.

Q. Were you ever advised by the Chief Engineer or First Assistant, or anyone, that that section would be removed at a later date for replacement or repair? A. No, no.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Gunnar Elixson.)

Q. Now, you came up, you say, some time after you were originally asked to get water on system, and found the fire department there. Approximately how long was that after you first received the report to give them water on deck?

A. Well, I couldn't say.

Q. Half an hour?

A. Oh, (interrupted)——

Q. Thirty seconds (interrupted)——

A. Less than that (interposed).

Q. Fifteen minutes?

A. I guess closer to fifteen or twenty minutes.

Q. An estimated fifteen or twenty minutes after you first received a report that they wanted water on deck? [194]

A. Well, I couldn't say, because I wasn't—I just came up there and ran down again—I couldn't say.

Q. Well now, when you checked the fire pump after they first told you there was no water and you found that the pump was running, did the indicator gauge show pressure? A. Yes.

Q. What pressure did that show?

A. About eighty pounds, I guess, on there.

Q. Does that have a by-pass system, where it just circulates within itself?

A. Well, if you get too much pressure, there's a relief valve that relieves the pressure.

Q. That's automatic though, is it not?

A. Yes.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Gunnar Elixson.)

Q. Is there any way of knowing when that relief valve actually activates itself—when it works?

A. Well, you can see where it goes down into the bilge, you know.

Q. Now, as far as you recall, there were no workmen in the engine room at all, performing any work on the fire main?

A. Not on the fire main, no.

Q. But they were on the generator?

A. On the generator, that's right.

Q. How many generators aboard?

A. We have three. [195]

Q. Are they main ship's service generators—all three of them, or is one the emergency?

A. No, they are all (interrupted)——

Q. Main ship's generators. And they were working on one, so there was still adequate facilities for the electrical demands?

A. Yes, that's right.

Q. And, then you went off watch at midnight, did you? A. Yes.

Q. What did you do then, turn in?

A. Yes.

Q. Did the Master or the Chief Engineer, upon returning to the ship, contact you?

A. No.

Q. Neither one of them spoke to you when they came back that evening. And then when did you next go on watch?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Gunnar Elixson.)

A. Well, 4:00 o'clock the next afternoon, the following day.

Q. Now, when you went on watch then, did you check to see if the fire main was in?

A. Yes; the line was in that time, yes.

Q. It was in then? A. Oh, yes.

Q. Were there any workmen working on it, or was the work completed?

A. No; it was all installed; completely [196] installed.

Q. Now, when you went up topside and observed that the fire department was there, the night of the fire, did you notice whether or not any shore line had been hooked up to the fire main?

A. No; I couldn't say—I couldn't say to that. You know, I didn't check.

Q. Now, who was on watch with you in the engine room?

A. There was an Oiler and a Fireman.

Q. Who were they?

A. Well, I couldn't say; I don't know their names.

Q. Would you know, seeing the crew list?

A. Oh, yes. There was the four to eight Oiler and the four to eight Fireman.

Q. Well, you have several Oilers and several Firemen?

A. Well, I don't know their names.

Q. You don't know them by name, huh? But there was one Oiler and one Fireman?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Gunnar Elixson.)

A. One Oiler, that's right.

Q. And did this Oiler tell you that they had a fire on deck?

A. Well, he told me that—well, the shore workers told him that they wanted—that there was a fire there—and they wanted the fire pump started, and he didn't say, you know, specifically.

Q. He didn't specify that there was a fire?

A. No; I guess they told him there's a fire, so he went down [197] to start the fire pump.

Q. Have you sailed as a Chief Engineer, Mr. Elixson? A. No; I haven't sailed as that.

Q. What licensed capacities have you sailed?

A. I've sailed as—well, from Third to First Assistant.

Q. Now, ordinarily, in assuming the watch, you assume the responsibility of the operation of the equipment in the engine room, unless you've been advised that certain equipment is not in operation, is that right?

A. Yes; ordinarily, in a case like that, they usually notify that something is being repaired and out of service.

Q. But in this particular case, you received no notification whatsoever? A. No.

Q. The Second Assistant would have had the noon to—what watch would he have, 8:00 to (interrupted)——

A. Eight in the morning to 4:00 in the afternoon.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Gunnar Elixson.)

Q. And the First Assistant on with him?

A. Well, he's on day work, too.

Q. And you and the Third (interrupted)——

A. The Third comes on from midnight to 8:00 in the morning.

Q. I see. Now you did not, I understand from what you have said so far, engage in fire fighting to any extent in connection with this casualty?

A. No. [198]

Q. Where is your fire station aboard ship?

A. Well, I'm on the CO2; in charge of the CO2.

Q. And would that indicate that you were to proceed to that station in the event of fire?

A. Yes, if I'm off watch.

Q. And if you're not off watch, then what?

A. In the engine room.

Q. Stand by the engine room. Did you hear the fire alarm sound?

A. Yes; that was after we got the fire pump started.

Q. You heard the fire alarm sound?

A. Yes; that was ringing.

Q. Approximately how long after you started the fire pump, or after the Oiler started the fire pump up?

A. I guess it was two or three minutes.

Q. And was it after this alarm was sounded that someone from the topside came down to report they weren't getting water?

A. I think one of the Mates—I think that's the

Respondent's Exhibit No. 23—(Continued)
(Testimony of Gunnar Elixson.)
time I ran up and I heard someone say they weren't getting any water.

Q. This was about the same time the fire department arrived, is that right, or did you go topside twice?

A. Well, I went up a couple of times; I was trying to find the First Assistant. I knew he was supposed to be aboard there.

Q. Did you find him? [199]

A. Well, he came on later, but at that time I couldn't find him.

Q. I see. Did you assume he was aboard?

A. Yes.

Q. Now, how many times in all did someone from topside repeat to you that they weren't getting water?

A. Well, I didn't hear anything for that matter.

Q. What do you mean, you didn't hear anything?

A. Well, I mean—on the phone you mean?

Q. Well, phone or somebody coming down. How many times was it reported to you that they weren't getting water by anyone from topside, either (interrupted)——

A. Well, that's the time I told you. I went up to the deck level and I heard that somebody around —I think one of the Mates—the Third Mate—said they weren't getting any water pressure, so then I went down and checked again—the fire pump (interrupted)——

Respondent's Exhibit No. 23—(Continued)
(Testimony of Gunnar Elixson.)

Q. And then you came back up again, did you?

A. Well, not right away, no.

Q. Well, when did you go back up again; how soon after that?

A. Oh, I don't know; I'd say two or three minutes later—I'm not sure.

Q. And did you ask, then, when you went up, if they were receiving water or getting water?

A. Well, that time, then, they had the fire department there. [200]

Q. Well, I mean, what does that mean? The fire department is there—don't you feel they still might need ship's water?

A. Well, we couldn't do anything about it. At that time, I called—the Third Assistant came out of the room—I came looking for the First Assistant and he heard me calling the First and came out of the room, so he came down, too, and he checked the fire line. That's the time (interrupted)——

Q. The First?

A. No; the Third Assistant.

Q. The Third Assistant?

A. Yeah. So he came down and he started checking the line, and that's the time we discovered it was blanked off there, see?

Q. I see; he found it. And had he indicated to you that he knew anything about it beforehand—that this line was missing?

A. Well, when he mentioned that, then I went up and checked on it, too, and it was blanked off.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Gunnar Elixson.)

Q. Then I believe you stated earlier that when the Master came back aboard he didn't contact you?

A. No, no.

Q. Or the Chief Engineer? A. No.

Q. Did the Chief Engineer contact you the next day? A. No; he didn't say anything. [201]

Q. He didn't say anything to you. In other words, the Chief Engineer has not discussed this casualty with you at all, as to why—as to the failure to have water on deck at the time of the fire, is that right? A. That's right.

Q. Do you have anything further you'd like to add, Mr. Elixson, that you feel might be pertinent to this investigation that hasn't been brought out by the questioning thus far?

A. Not that I can think of offhand, no.

Q. I believe you stated that the fire system, when you came on watch the next day had already been repaired?

A. Yes; I noticed that, because I made a point of checking that. I went down and checked the fire pump; everything was lined up as it should be.

Lt. Cmdr. Mason: Anybody?

Mr. Roberts: Would you ask him how many times, if he knows, whether the Oiler was contacted by telephone?

Q. Do you know whether the Oiler was contacted on the phone in the engine room?

A. No, no, this shore worker came down. The Oiler was on his way up out of the engine room and

Respondent's Exhibit No. 23—(Continued)
(Testimony of Gunnar Elixson.)

this shore worker was on his way down, so he met him someplace halfway between or so. I guess he told him, "They've got a fire back there and they want, you know, water back there," so the Oiler rushed down there and started the fire pump. [202]

Q. Do you know whether the engine room phone was sounded at all? In other words, did anyone call for the engine room on the phone that you know of?

A. Well, myself, I don't know. Down below there, you know, it's hard to say.

Q. Where is that? A. On the upper level.

Q. And you were down in the lower level, is that correct? A. Yes.

Q. Is it such that you wouldn't have heard it down there?

A. Well, ordinarily you can, but you know—those conditions—it's hard to say.

Q. What do you mean by "those conditions"?

A. Well, you know, the excitement, but offhand, I'd say I didn't hear it—the phone ring there.

Q. Do you know whether anyone from topside contacted the Oiler other than that one time you just mentioned—did they contact him again?

A. I couldn't say.

Q. Now, the Oiler was just, as you stated, going topside at the time?

A. Yes; he was on his way up out of the engine room and he met this shore worker coming down.

Q. And then he came back down?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Gunnar Elixson.)

A. He came back down and rushed down and started the fire [203] pump.

Q. Did he report to you before he did it?

A. No; he started it up—that's his station anyway—he usually starts it up at the fire drills, see?

Q. I see.

A. So I was—I guess I was on the boilers and I came around and I met the Fireman, so he says, "The Oiler wants to see you by the fire pump," so at that time the fire pump was running, so he says, well, "They've got a fire in number five hold," so I checked the valves and pressure and everything was okay down there.

Q. I see. Where is the pressure gauge located, in relation to the pumps?

A. It's right alongside the pump there.

Q. Right alongside?

A. On the bulkhead there.

Q. Is it a large dial?

A. Well, it's about four or five inches in diameter or so.

Q. And what was the reading on that?

A. Well, approximately—offhand I'd say about 80 pounds, I guess.

Q. About 80 pounds. What is the normal pressure at a fire drill, for example, when you have to put water to the fire mains?

A. Well, I guess it might be somewheres around there; it [204] might be a little less.

Q. In other words, to your thinking, then, the

Respondent's Exhibit No. 23—(Continued)
(Testimony of Gunnar Elixson.)
80 pounds that you saw registered on the indicator was accurate?

A. Well, I didn't have the—I didn't stay long enough—I saw the pressure was there. There was enough—sufficient—pressure anyway.

Mr. Gryziec: Would you ask him how long he watched the gauge, Commander, to find out if at any time the pressure fell off?

Lt. Cmdr. Mason: Well, he just stated that he took a quick glance at it, and he wasn't there long enough to look that way. Very well, Mr. Elixson, I have nothing further. Thank you, very much, sir.

(Witness excused.)

(Adjourned at 4:20 o'clock p.m., Friday, April 4, 1958.) [205]

Third Day—Morning Session

(The preliminary investigation reconvened at 8:30 o'clock a.m., Monday, April 7, 1958.)

Lt. Cmdr. Mason: For the purposes of the record and identification, the photo copies which I took of the loading plan as received by me from the vessel are marked Coast Guard Exhibits 4 and 5. And Federal Register Reprint, Series Number 30-57, dated 20 December, 1957, is marked as Coast Guard Exhibit 6.

(Documents above referred to were marked Coast Guard Exhibits 4, 5 and 6.)

No. 17070

United States Court of Appeals

for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC., an Oregon Corporation,

Appellant,

vs.

HERSHEY CHOCOLATE CORPORATION, a Delaware Corporation, et al.,

Appellee.

Transcript of Record

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Respondent's Exhibit No. 23—(Continued)

Lt. Cmdr. Mason: We will call Mr. Sterling as our first witness.

HERBERT W. STERLING

was called as a witness by the United States Coast Guard and, first having been duly sworn, was examined and testified as follows:

Examination

By Lt. Cmdr. Mason:

Q. Please state your full name and address, sir.

A. Herbert W. Sterling, 109 Roanoke, Seattle, Washington.

Q. And what is your occupation, Mr. Sterling?

A. Port Engineer.

Q. And, as I understand it, you are employed in that capacity by Luckenbach Steamship Company, is that correct?

A. That is correct. [207]

Q. And how long have you been employed by that firm, sir?

A. Well, I have been in the total employ for thirty-four years.

Q. With Luckenbach?

A. With Luckenbach.

Q. Would that also be the extent of your experience in the field of port engineer?

A. Well, I haven't been a total of thirty-four years as port engineer, but I have been fifteen years as a port engineer.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Herbert W. Sterling.)

Q. I see. Briefly, Mr. Sterling, what does the duties of port engineer encompass?

A. Well, the various duties—as company representative for lots of ship's business.

Q. And would it be your duty then to arrange for the performance and completion of ship's repairs for vessels coming in, would that be correct?

A. Yes; those are part of my duties.

Q. Now, as I understand it, you served in the capacity of port engineer as representative for the Robert Luckenbach when she arrived at Portland on 2 April, is that correct?

A. That's correct.

Q. And at this time, were there any job orders submitted to you by the vessel?

A. Yes; there were. [208]

Q. Who specifically gave you these particular repair jobs?

A. Well, one was a written order. With the verbal order—at the same time he handed me a written order, he asked me a verbal order and then the Chief Officer gave me a verbal order.

Q. Well, now, when you speak of "he," to whom are you referring?

A. The Chief Engineer.

Q. The Chief Engineer? He gave you a list of items—particular items? A. Two items.

Q. Two items?

A. Two items and then he gave me a verbal order for one item.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Herbert W. Sterling.)

Q. I see. And then you say also that you receive further repair requests from the Chief Mate?

A. Yes, sir.

Q. And how many items were (interrupted)——

A. One.

Q. One item on that? Was that verbal?

A. That's up until that date.

Q. Yes, sir, and that was verbal, was it?

A. That was verbal.

Q. I see. Now, specifically, what were the written job orders that you received from the Chief Engineer? [209]

A. Now, wait a minute—I don't think I have it in my book, but I don't remember what the written orders was. One was to fix the hinges on the meat box door and another was (interrupted)——

Q. Well, we'll come back to that.

A. I can't think of it right now.

Q. We will come back to that question a little later, sir. You also received a verbal from the Chief Engineer? A. That's right.

Q. What was that?

A. Well, he said his fire line was defective and he asked me if I would repair it and when we took the line out, if we would put the blank flanges on and blank it off. And I issued that order to the yard to remove that pipe and furnish two blank flanges and install them on the fire lines.

Q. I see. Now, when you speak of "the yard," you mean to Albina (interrupted)——

Respondent's Exhibit No. 23—(Continued)
(Testimony of Herbert W. Sterling.)

A. Albina Engine and Machine Works.

Q. I see. And now, what was the verbal order or repair request given you by the Chief Mate?

A. He asked me to fix a ladder rung on the after ladder in number 5 hatch, lower hold.

Q. On the after ladder of number 5 hatch?

A. That's right; lower hold.

Q. Now, did you personally examine these various items of [210] repair? A. Oh, yes.

Q. And what did you find as the result of your examination of the ladder in the lower hold of number 5?

A. Well, the cargo was some metallic conduit pipes stowed down in the lower hold. It was up and the longshoremen were discharging it and I went back three times in the afternoon to see if it got down to the level of where the rung was out and it hadn't. And I counted the rungs down from the top—I counted down to twenty rungs and I didn't see this particular vacancy where the rung was supposed to be; so I—and then I asked the mate—I asked him three times if he was sure it was that rung—if it was ladder that it was out and he says, "Yes."

Q. This was the Chief Mate?

A. Chief Mate.

Q. So what did you do then with respect to the ladder?

A. Well, I still waited for the longshoremen to

Respondent's Exhibit No. 23—(Continued)
(Testimony of Herbert W. Sterling.)
discharge the cargo. The cargo wasn't discharged yet.

Q. Were you aboard the ship most of the day, sir?

A. I was aboard until 3:00 o'clock—about a quarter to 4:00, I went over—my ankle started to paining me so bad, I injured my ankle in the morning in the car.

Q. I see. And then you left the ship then about a quarter of 4:00? [211]

A. I had to. I had to go and take care of my ankle. It was paining me so bad that I couldn't walk on it.

Q. Now, at the time that you left, had you at that time ascertained where the rung was missing?

A. No; he still insisted it was in the after ladder, and I says, "I still couldn't see the bottom of the ladder." So I left the ship. The order remained the same, that the missing rung was at the bottom of that ladder some place.

Q. And then did you return to the ship at a later hour? A. Yes; I did.

Q. And what time was that?

A. Oh, it was about a quarter to 7:00.

Q. About a quarter to 7:00. What did you find then?

A. Well, we found the vessel was afire.

Q. And what action, if any, did you take at that time?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Herbert W. Sterling.)

A. Oh, there was nothing I could take. The Fire Department had control.

Q. I see. Did you remain aboard the vessel then?

A. Oh, yes; stayed there until after 10:00 o'clock.

Q. I see. Did you make any inquiries as to how the fire started?

A. No; I didn't. I couldn't find anybody that knew how the fire started and couldn't obtain any information.

Q. I see. Now, referring to the renewal of this section of fire main, did you make the necessary arrangements for these [212] repairs to be made?

A. That's right.

Q. Who specifically did you make the arrangements with?

A. Oh, I made it with Dick Bailey of Albina—he is the co-ordinator.

Q. Was this a verbal or written request?

A. Verbal order.

Q. Verbal order? Was it later confirmed in writing?

A. No; he hasn't done it—even up to date we haven't got that far with it.

Q. And did you discuss this particular job with anyone else other than the Chief Engineer, insofar as the crew of the ship is concerned?

A. No; I only deal with the Chief—I deal with the heads of the departments.

Q. Well, how about the Chief Mate, was he ad-

Respondent's Exhibit No. 23—(Continued)
(Testimony of Herbert W. Sterling.)
vised or informed or in any way did he discuss this matter with you—this particular job of the fire main?

A. No; that is not in his department.

(Documents were marked Coast Guard Exhibits 7A and 7B.)

Q. Now, Mr. Sterling, handing you what has been marked Coast Guard Exhibits 7A and 7B, will you please state whether or not the contents therein represent the repair items which were to be done aboard the Robert Luckenbach?

A. Yes; these are the items. These items were arranged ahead, [213] before the vessel's arrival by letter.

Q. The items contained in Coast Guard Exhibit 7A? A. That's right.

Q. One through three? A. That's correct.

Q. And how about those items on 7B?

A. These were issued verbal.

Q. All of the items in 7B were issued verbally?

A. Well, this number 6 here was in consideration previously, but they were just going to take the measurements, but the yard said they could take the measurements and manufacture the boards and install them so I told them to go ahead. And then this number 8 was verbally, too. When we were down looking at the generator, why, the Chief asked me to fix this throttle, so we included that in the repair orders.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Herbert W. Sterling.)

Q. I see. Now, referring to work item one, which pertains to the Uni-strut installation, number two lower 'tween deck, port and starboard, as noted on Coast Guard Exhibit 7A, did that particular repair item involve or require welding, do you know?

A. Well, that is not a repair item. It is what we call—it is a new installation.

Q. An installation, I see.

A. That is a new installation and this item here, why, they had to remove all the dunnage and had to broom clean the [214] decks so they could do the welding and then the deep tanks were all cleaned out, too.

Q. So specifically, then, welding was required?

A. This is all welding—this is all welding. Nothing is drilled or tapped and bolted.

Q. Now, as I understand it, the Coast Guard was not notified in advance of the fact that welding was to be done on board the vessel? Did you make any contact with the Coast Guard relative to that?

A. No; I never have in twelve years of operation in Portland.

Q. I see. Are you familiar with any such requirement?

A. Oh, yes. New York Harbor.

Q. I am speaking now of any requirement to notify the Coast Guard at any waterfront facility?

A. You mean in (interrupted)——

Q. With respect to welding?

A. In this district?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Herbert W. Sterling.)

Q. In this area?

A. No. We always left it up to the yard.

Q. You left it up to the yard?

A. (Affirmative nod.)

Q. I see. Now, referring to item five on Coast Guard Exhibit 7B, which pertains to the renewal of the section of the fire line, what arrangements, if any, did you make for the furnishing of dock water facilities for the vessel for the purposes [215] of maintaining fire protection?

A. Well, I asked—after he put the blanks on—took the line out and put the blanks on, I asked the Chief if he could handle that situation from there on. He said, "Yes," he'd take care of it.

Q. What situation from there on?

A. Well, putting the hose on the fire line. He had a hose available right alongside of the fire line. All he had to do was to move it five feet.

Q. Could you explain a little bit just what that would entail? In other words, would that mean using a fire hose between the sections where the fire main had been removed?

A. No; not in that particular statement. That was the fresh water line off of the dock.

Q. I see. That would be fresh water for furnishing the tanks?

A. That's right. And he was using the fresh water line to fill the forepeak tank and he could have transferred that line up to the fire line, and then he could also have went up on the bridge deck

Respondent's Exhibit No. 23—(Continued)
(Testimony of Herbert W. Sterling.)

and he could have taken a hose there from number six plug and put it right on the starboard side and cross-connected it.

Q. I see. Well, now (interrupted)——

A. The fire line wasn't totally cut out. The port-side was available, up through the house—the mid-shiphouse and he could have by-passed off of [216] there.

Q. Well, now, the Chief Engineer has already testified here that the only place where water was available from the ship's fire pump was in the engine room space itself. Is this in error then?

A. He is in error.

Q. Where else specifically now would water have been available to the (interrupted)——

A. Well, right after the Chief Engineer's office, there is two half—inch and a half fire plugs. Pressure could be applied on them by starting the fire pump.

Q. Is this inside the deckhouse?

A. It is in the alleyway.

Q. It is in the alleyway?

A. The saloon deck alleyway.

Q. Well, would that be the forward part of the deckhouse?

A. No; just about half way—about midway between fore and aft. I didn't measure it, but I would say midway.

Q. And port or starboard? A. Port.

Q. On the port?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Herbert W. Sterling.)

A. There was also one on the starboard but the one on the starboard side was cut out.

Q. I see. Where does this particular line lead? As I understand it, the Robert Luckenbach is equipped with a single main system. [217]

A. That's right.

Q. And this particular section of line that was removed and blanked off, as I understand it, prevented water from reaching a certain number of the hydrants? A. That's right.

Q. You say now that there was another line leading up—a riser was it that this hydrant (interrupted)——

A. That's right, it is a three-inch riser that comes off of the line as it comes out from the pump, and it continues vertically right up inside the engine room casing and it leads out to different stations and there are three stations on the portside. One is on the saloon deck, one is on the passenger berth deck and one is on the bridge deck.

Q. I see, and you say you did discuss this with the Chief Engineer to the extent that he stated that he would take care of it?

A. He said he would take care of it.

Q. You had no plans that the contractor in this instance was to handle this, do you? A. No.

Q. I mean, it was not your intention, for example, that while the renewal or the replacement of this line was in progress that the contractor

Respondent's Exhibit No. 23—(Continued)
(Testimony of Herbert W. Sterling.)
would be required to furnish the necessary (interrupted)——

A. No; that is not in the contract. If the Chief Engineer [218] didn't have the equipment nor the labor, he can make a request to me that he couldn't install it and I would do it for him. But when he said he could take care of it, that is not necessary for me to hire the labor to do it and the equipment.

Q. I see, in other words, then, had it been necessary for the contractor to furnish any dock facilities, that would have been written up as a separate job order also, would it not?

A. Separate order.

Q. And, in this instance, no such order was written to Albina?

A. No such order was issued.

Q. Now, the Luckenbach Terminal pier is equipped with fire hydrants, as I understand it?

A. They have fire hydrants all over.

Q. They do have hydrants all over. Are there—their couplings also of such size as to accommodate the ship's hose?

A. Oh, yes; the national standard.

Q. And the ship's hoses, as I understand it, are two and a half inch?

A. They are national standard two and a half.

Q. Now, referring to item number 4, which is the repair of the ladder rung, what arrangements, if any, were made by you relative to any fire protection during the welding?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Herbert W. Sterling.)

A. Well, we don't make any. The yard, when they go up, they generally have a man—they bring three men along and one of [219] them is generally a foreman and then they have a man as a fire watch and then they have a welder.

Q. I see.

A. They are supposed to have the equipment.

Q. Now, with respect to the fire watch and equipment—to what do you refer? Would you consider, for example, a drinking bucket of water near at hand sufficient (interrupted)——

A. No; they should have one of these little spray pumps like they used to have during the war for (interrupted)——

Q. You mean a water spray?

A. Yes; water spray.

Q. Has it been generally—the practice as you have observed it for such a pump to be furnished by the welders?

A. Oh, yes; the yard—the yard—they used to have lots of them. Sometimes they bring a CO2 along. That's up to the yard, whatever they want to send along with their fire watch.

Q. I see. Did you in your request for this particular repair of the ladder rung, put that in writing, or was that a verbal request made to you?

A. No; that's always—that's always a standing order. We don't write that up every time.

Q. Oh, no; I mean for the repair of the ladder

Respondent's Exhibit No. 23—(Continued)
(Testimony of Herbert W. Sterling.)

rung, did you put that in writing, for the repair of the ladder rung itself?

A. No; I gave that to them verbally. [220]

Q. You gave it to them verbally?

A. Sure.

Q. And you received it verbally?

A. After I received it verbally. And then the yard—they write these—these are only temporary orders because they haven't got the codes on them. I would have to put the codes on them.

Q. Right, but, on the day of the 2nd of April, when the fire occurred aboard the ship, that order that had been given to Albina by you had been, with respect to the ladder rung, had been verbally?

A. That's right.

Q. Who did you give this verbal order to?

A. Dick Bailey.

Q. Now, at the time that you gave him this verbal order, did you tell him at—any specific time when the job was to be done?

A. No; because we didn't know what time the cargo would be out.

Q. And it was your intention that it would be done when the cargo was out?

A. When the cargo was out, providing that the cargo was out between 6:00 and 7:00, which is the longshoremen's meal hour. If the cargo wasn't out by that time so we could do the work, we wouldn't do, because it would interfere with the longshore-

Respondent's Exhibit No. 23—(Continued)
(Testimony of Herbert W. Sterling.)

men, [221] and they won't work while you are welding.

Q. I see. Will they work while the ladder rung is missing?

A. Well, they have a temporary ladder rung on it.

Q. Do you know who installed that?

A. No; I don't know.

Q. Has the ladder rung since been repaired?

A. It has now in the engine room, while they were doing the other repairs.

Q. I see. So, as I understand it then, Mr. Bailey was given to understand that this ladder rung was on the after ladder of number 5 hold and was to be repaired as soon as the cargo was down sufficiently to disclose the missing rung and when the longshoremen knocked off?

A. Well, we were waiting for all the cargo to get out right in that particular locality.

Q. Of the after ladder?

A. Sure, so we would only have the ceiling exposed.

Q. I see. Now, when you left the vessel on the afternoon of 2 April, had the section of the fire main already been removed?

A. Oh, yes; that was out in the morning.

Q. It was out in the morning? And had you been notified of any expected time when the replacement would be back in?

A. Well, the next morning.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Herbert W. Sterling.)

Q. It was to be the following morning? [222]

A. (Affirmative nod.)

Q. Now, since this section of the fire main was out and you were of the impression, having discussed the matter with the Chief Engineer with respect to rigging up a temporary means for fire to the hydrants, then you didn't feel that there was any further responsibility encumbent upon you to ascertain that such fire protection was available at the time the various welding went on about the ship?

A. Well, no; I asked him if he could handle it and he said "Yes." Otherwise, if he wanted any more equipment, he should have requested it and then I would have put an order in for it.

Q. I see. Were you familiar with the cargo that was aboard the vessel?

A. No; I am not; I am never familiar with the cargo.

Q. Did you make any inquiries to ascertain what cargo was in number 5?

A. No; in the after end, I looked at that myself.

Q. And that was, I believe you stated, conduit?

A. That was conduit, both rigid and flexible.

Q. You didn't observe any of the other cargo, what it (interrupted)——

A. No; I just looked at that after section.

Q. Now, I am trying to get a little clearer picture here, Mr. Sterling, relative to the repair of

Respondent's Exhibit No. 23—(Continued)
(Testimony of Herbert W. Sterling.)

this ladder rung as to why it so happened that the welders came aboard between the hours [223] of 6:00 and 7:00 in the evening when the longshoremen knocked off, for this repair, particularly as it had been stated by you that it was to be done after all of the cargo in the area had been discharged. Can you throw a little light on that?

A. Well, that was not all of the cargo was discharged, because there was some cargo in there that was loaded at Longview in the middle of the hatch. What we call a section is the last two beams, of the hatch—so there was conduit was stowed down there between the ladder and the paper, so when they lifted out that—they lifted out this conduit, there was half of the portside of the hatch had, oh, I'd say it was approximately two inches in diameter conduit—rigid conduit and then on the starboard side of the hatch was this flexible stuff, wrapped up in coils and also aft of the ladder. So the ladder, when I left there, the rung wasn't exposed, so we generally don't like to weld in any place unless we have it right on down to the ceiling or the dunnage.

Q. Have you since ascertained whether any ladder rung was missing on that after ladder?

A. No; there has never been—we never found a ladder rung missing on that ladder.

Q. When did you first become aware that there was a rung missing on the forward ladder?

A. I found that out when I got over there and looking down the hatch at the fire. [224]

Respondent's Exhibit No. 23—(Continued)
(Testimony of Herbert W. Sterling.)

Q. At the time of the fire?

A. At the time of the fire, after the—when the Fire Marshal went down in the hatch.

Q. I see. You didn't know it before this time?

A. No; I didn't know it before that time.

Q. Now, you have, as I understand, nothing to do with the arrangements relative to discharge and on-loading of cargo? A. No; I do not.

Q. That would be the job more of the Marine Superintendent, would it?

A. That's right; the operating department.

Q. And you did specifically discuss the repair of the ladder rung in some part with the Chief Mate?

A. Well, he made the request and he gave me the location and he said it was the rung in the after ladder.

Q. And who was present at that time besides yourself and the Chief Mate, if anyone?

A. I don't think anybody was present when he made the request about the ladder.

Q. Was Mr. Bailey present?

A. No; he was away some place. And when he come back, I told him about the ladder.

Q. Well, when you told Mr. Bailey about the ladder, was the Chief Mate present?

A. No; he wasn't present, either, and that was at approximately [225] 11:00 o'clock and the Mate told me about 10:00 o'clock.

Respondent's Exhibit No. 23—(Continued)

(Testimony of Herbert W. Sterling.)

Q. I see. Was it the mate that advised you of the repairs to the meat box door hinges?

A. No; that was the Chief Engineer.

Q. I see. Were any of the other items indicated on Coast Guard Exhibits 7A and 7B referred to you by the Chief Mate, other than this ladder rung?

A. No; that is the only item that he requested.

Q. I see. You did not discuss with the Chief Mate any of the items that had been submitted by the Chief Engineer? A. No, sir.

Q. Speaking specifically of the removal of the fire main section? A. (Negative nod.)

Q. Then the Chief Mate to your knowledge was not aware of the fact that this section was to be removed?

A. Well, as far as my knowledge, I don't know what the Chief Engineer—if the Chief Engineer had told him or advised him or anything. I don't know that.

Q. But to your knowledge (interrupted)——

A. Well, it was not in my presence, anyway.

Q. Now, you stated when you came back to the ship later in the evening that the fire was already in progress and the Fire Department was at the scene? A. That's right. [226]

Q. And what did you do when you came aboard at that time?

A. Chased off a couple of photographers.

Q. Was that the extent of your action?

A. There was nothing else I could do much.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Herbert W. Sterling.)

Q. Was the hatch opened to number 5 at this time?

A. It was wide open. All the covers were off.

Q. Number 4?

A. Well, I don't know about number 4. I think the forward end was open.

Q. And the firemen had hoses into the—directing hoses into the number 5?

A. Well, they had—I don't know—twelve hoses, it looked like to me.

Q. Did you observe whether there were any ship's hoses rigged at that time?

A. No; I couldn't see that, there was so much smoke and everything. There were so many men around there. I only just come up on the port forward corner and looked down there and I was talking to, I presume, the Battalion Chief.

Q. Are you familiar with a hydrant on the terminal pier, presumably located in close proximity to the ship's gangway, or where the ship's gangway was on the 2nd of April?

A. No; about the only thing I observed was generally the location of the fresh water connection.

Q. And where was that located? [227]

A. That was right about in the middle of the midshiphouse.

Q. On the ship?

A. Well, the fresh water connection on the ship or on the dock?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Herbert W. Sterling.)

Q. Well, I wanted to know just where it is located on the dock.

A. On the dock, was about just at the center of the midshiphouse, fore and aft.

Q. I see. You didn't observe whether there was any fire hydrant in close proximity thereto?

A. No; I didn't.

Q. When you returned aboard, did you see Mr. Bailey?

A. Yes; I seen him as soon as I come on board.

Q. And did you speak with him with respect to the fire?

A. No; I didn't have an opportunity because he was concerned about one man that they hadn't located. I talked to him later on.

Q. One man that they hadn't located?

A. That's right.

Q. And you spoke with him later on—did you ascertain what was meant by that one man that he hadn't located?

A. Well, that's the way I understood it, but later on, he said that he knew that he sent this one man to take the other two men back to the yard.

Q. Now, when you spoke with him later, was any discussion made [228] as to the probable cause of the fire?

A. No; he wasn't present at the time it started, so he didn't have any concrete information.

Q. Now, as I understand it, the vessel has, since

Respondent's Exhibit No. 23—(Continued)
(Testimony of Herbert W. Sterling.)

this casualty, been drydocked for repairs and is she off drydock now?

A. Well, I called up the yard and they said they pulled her off this morning and she is up at the loading berth. I haven't seen it myself.

Q. I see. And were you down to make a survey of the damage?

A. Oh, yes; I was at all the surveys.

Q. What is the estimate of damage to the vessel?

A. Well, we haven't got to the estimate yet.

Q. I see. Has there been any discussion relative to estimates? A. Well, there has been a guess.

Q. What was that?

A. I made a guess, I said between fifteen and twenty thousand dollars, including the drydocking. That's only just a wild guess—if we could ever determine how much bulkhead we was to take out.

Q. Well, now, with respect to the survey of the damage to—to what extent does the damage entail? What does it involve?

A. Well, it involves two shell plates—two sections of shell plates. [229]

Q. Were they buckled?

A. Well, they were overheated and then they were quenched with cold water.

Q. I see.

A. Which warped them; might have caused brittleness.

Q. Where was that, port or starboard?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Herbert W. Sterling.)

A. Portside.

Q. Portside? A. Forward end of the hold.

Q. Was that the only structural damage observed by you?

A. No; the deckhead beams were overheated and they dropped.

Q. They did drop?

A. The bulkheads is warped—the centerline bulkhead is warped, was renewed; sections of the thwartships bulkhead was renewed.

Q. What was the condition of the tops of the deep tanks? A. There was no damage.

Q. No damage?

A. It didn't even char the landing pad.

Q. I see.

A. Didn't even blister the paint; didn't burn the paint; didn't do any damage.

Q. Have you received any report or indication of the extent of a—of damage to cargo?

A. No, I haven't. [230]

Q. When is the vessel expected to be ready to depart again?

A. Well, that's when the cargo gets in. I can't answer that question. I don't know how much cargo there is to put in.

Q. Well, are all of the repairs accomplished now as far as you know?

A. Well, there's just a little painting and the

Respondent's Exhibit No. 23—(Continued)
(Testimony of Herbert W. Sterling.)

paint has to dry out before we can load the cargo in there and we have to deodorize it.

Q. I see. But the major structural repairs—— (interrupted).

A. The structural repairs are all complete.

Q. Now, is there anything further that you would care to add, Mr. Sterling, which you feel might be pertinent to this investigation?

A. No, there is nothing that I have to add. You have pretty well covered it.

Q. And just for ready reference, where would be the—or how would we most likely be able to get in touch with you in the event it would be necessary to call you again at a later date to testify?

A. Pier 50, Seattle, Washington.

Q. Is there a phone there we could reach you by?

A. Oh, yes.

Q. What is that phone number?

A. Just a minute, they just changed the prefixes. It's Main 3-1208. [231]

Lt. Cmdr. Mason: Well, I have no further questions at this time, Mr. Sterling. I know you are a very busy man. I want to thank you for coming up here today.

A. You are entirely welcome.

(Witness Excused.)

Respondent's Exhibit No. 23—(Continued)

RICHARD DAVID JANSEN

was called as a witness by the United States Coast Guard, and first having been duly sworn, was examined and testified as follows:

Examined

By Lt. Cmdr. Mason:

Q. Will you state your full name and address, sir?

A. Richard David Jansen, 2646 East Balfour Avenue, Fullerton, California.

Q. And your occupation, Mr. Jansen?

A. Chief Officer of the Robert Luckenbach.

Q. And am I correct in assuming that you are licensed by the Coast Guard as a Merchant Marine officer? A. Yes, I am, sir.

Q. And do you hold a Master's License?

A. Yes, sir.

Q. I have before me a crew list of the Robert Luckenbach for the past voyage, which indicates thereon your license number to be 215 990, is that correct, sir?

A. I wouldn't know the number off-hand. It probably is correct. [232]

Q. How long have you been serving in a licensed capacity in the American Merchant Marine, Mr. Jansen? A. Approximately six years.

Q. And how long have you been going to sea in all? A. Nearly fourteen years.

Q. And how long have you been employed by

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard David Jansen.)

the Luckenbach firm? A. Six years in June.

Q. That would be all of your—nearly all of your licensed time? A. Nearly all, yes, sir.

Q. And how long have you been aboard the Robert Luckenbach? A. Six years in June.

Q. And how long of that time have you served in the capacity of Chief Mate on the Robert Luckenbach? A. Three years in June.

Q. What was your duty prior to that time on the Luckenbach? A. Second Mate.

Q. Second Mate? And that was for approximately three years?

A. No, I started on there as—well, actually as Bos'n about seven years ago, but six years ago as Junior Third Mate.

Q. I see. And you were assigned as Chief Mate on board the vessel on 2 April 1958, the date of the fire in question? A. I was, yes, sir.

Q. And you were aboard the vessel that morning, were you? [233] A. Yes, I was.

Q. As I understand it, you, upon arrival at Portland, submitted certain repair requests to Mr. Sterling, would that be correct, sir?

A. That's true.

Q. What specifically did these repairs involve?

A. Well, it was a verbal order and it involved the repairing of a ladder rung in the after hold of number 5—after ladder.

Q. And this was a verbal request—— (interrupted). A. Yes.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard David Jansen.)

Q. ——to Mr. Sterling?

A. To Mr. Sterling.

Q. Was there anyone else present at the time that you made this request?

A. Off-hand, I don't remember.

Q. What was his response to the request? That is, did he indicate when it would be done?

A. Yes, they would try to get it done.

Q. And why did you happen to make this particular request?

A. Because the ladder rung was missing.

Q. How did you establish that?

A. It was knocked out by the stevedores in Los Angeles.

Q. Did you observe it personally, or was this reported to you?

A. This was reported to me. [234]

Q. And where was it reported, in Los Angeles?

A. In Los Angeles.

Q. I see, and who specifically reported it to you?

A. Third Mate.

Q. Third Mate? Did he state that he had observed it? A. Yes.

Q. And he specifically stated that it was the rung on the after ladder?

A. That, I can't say. I understood him to say it was the after one.

Q. I see. But it was the after ladder that you advised Mr. Sterling that had the rung missing?

A. Yes.

Q. Did Mr. Sterling indicate when the job would

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard David Jansen.)

be accomplished? A. No.

Q. Did you ask that it be accomplished at any particular time? A. No.

Q. Now, I have before me, Coast Guard Exhibits 7A and 7B, which Mr. Sterling has stated contained the various job orders submitted to him by the ship for various repairs. I will ask you at this time if you will look over those items, sir, and tell me whether any other than the ladder rung pertained to your department?

A. Other than the ladder rung, only one would pertain to my [235] department and that would be item six.

Q. Item six pertains to what, sir?

A. The deep tank hatch boards to be installed.

Q. And—— (interrupted).

A. Let's make sure now. Oh, I didn't look at this. Excuse me. I thought it was a duplicate. The Uni-strut, item number one, would also pertain to my department.

Q. I see. Now, this item number one, the Uni-strut installation, what action would this job have entailed?

A. The construction of a Uni-strut or Orlop deck.

Q. And how was it to be installed, by means of welding? A. Yes.

Q. I see, and at the time that you submitted this, was this also in writing or was it—— (interrupted).

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard David Jansen.)

A. That was submitted from New York.

Q. From New York?

A. I presume it was, yes.

Q. I see. You had nothing to do with the submission of that job order? A. No.

Q. Had you originally requested the item?

A. No.

Q. But, however, you were familiar with the fact that the job was to be done? A. Yes. [236]

Q. Were you aware of item five, which pertained to the renewal of a section of the fire main?

A. No.

Q. Now, were you aboard on 2 April when the fire occurred? A. No, sir.

Q. What time had you left the vessel prior thereto? A. Approximately 5:20.

Q. And at the time of your departure, were there any shore facilities hooked up to the vessel that you know of? A. I didn't notice.

Q. How about the fresh water line?

A. I didn't notice whether it was or not.

Q. Would that be your responsibility?

A. No.

Q. Whose responsibility would that be?

A. The engineers take care of the water.

Q. They handle the fresh water—filling of the tanks and so on? A. Yes.

Q. And when you returned to the vessel, what time was that approximately?

A. Approximately 10:30 p.m.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard David Jansen.)

Q. And what did you observe when you came back?

A. Well, Fire Department—fire in number 5 hold.

Q. Was the fire still burning at that time? [237]

A. Not actual burning; smoldering smoke. I didn't see any actual flame.

Q. I see. Did you make any inquiries at this time? A. Yes; I did.

Q. Who did you speak with?

A. The Captain was there, the Fire Chief.

Q. And from these inquiries, did you ascertain how the fire started? A. Yes.

Q. And further, what had been done in connection with combatting the fire?

A. I was observing what was being done. What had been done prior to that, I didn't know, of course.

Q. I see. Did you contact the mate on watch?

A. Yes.

Q. Did he give you any report?

A. No; not at that time. There was nothing exceptional.

Q. When did you first find out if at all that the ladder rung which was missing was actually on the forward ladder of number 5 hold?

A. Well, that night, when I came back to the ship, I found out that they had attempted to weld forward.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard David Jansen.)

Q. And did you ascertain what the purpose of this welding forward of number 5 was for?

A. I found out that they were trying to weld the ladder rung [238] up there.

Q. And did you inquire then of the Third Mate as to the need for welding forward when you were of the opinion that it was the after ladder that had the rung missing? A. No; I didn't inquire.

Q. Did you inquire at any time of him?

A. No; I didn't. I went back and read the damage report.

Q. Who had compiled the damage report?

A. The Third Mate had.

Q. Now, this is the Third Mate and not the Junior Third Mate, is that correct?

A. That's right.

Q. And had entries since been made in the log relative to the casualty?

A. The casualty—the fire?

Q. Yes. A. Yes.

Q. Did you make the entries?

A. No; I didn't. The mate on watch did.

Q. And that, I understand, was the Junior Third Mate? A. Yes, sir.

Q. Did you have occasion before going ashore on 2 April, to discuss with Mr. Bailey of Albina Ship, repair of the ladder rung?

A. Before going ashore? [239]

Q. Yes.

A. Yes; I think it was some time in the after-

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard David Jansen.)

noon we discussed it and the last I knew that they were going to check between 6:00 and 7:00 to see if this space was available—that is, the after end.

Q. You mean for getting at the missing rung?

A. Yes.

Q. And at this time, you were still of the belief that it was the after ladder in number 5?

A. Yes.

Q. And did Mr. Bailey indicate to you when he expected to perform the repair? A. No.

Q. Had you asked him or discussed with him the particular time that would be convenient to the off-loading for doing this repair?

A. No; the last I understood was that they were going to check between 6:00 and 7:00 to see if the cargo was out and repair it.

Q. I see. Now, when you came back aboard the ship the first time following the fire, did you ascertain that the ship's fire main system was inoperative? A. When I first came back, no.

Q. Did you at any time ascertain that it had been inoperative?

A. Yes; afterwards. [240]

Q. And was this your first knowledge that the main had been inoperative? A. Yes, sir.

Q. Now, before going ashore, just prior to the fire, had you given any instructions to the mate on watch? A. No; just standing orders.

Q. What were the standing orders?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard David Jansen.)

A. About ten or twelve items—standing lights and things like that.

Q. I see. Now, as I understand it, you are normally on day duty, is that correct, in port?

A. Yes.

Q. And would that entail from 8:00 to 4:00 in the afternoon? A. 8:00 to 5:00.

Q. 8:00 to 5:00? And the night watch would consist of two mates, who start from 4:00 and go through to 12:00 and then the next one takes over at 12:00 until the following morning, is that true?

A. Right.

Q. So there is actually an hour overlap there?

A. Yes.

Q. Now, when the Mate came on at 4:00 o'clock, he at that time merely had the standing orders which included the night lights to be exhibited and that sort of thing? A. Yes.

Q. You gave him no specific instructions as to the repairs [241] that were to be accomplished or to expect any repairmen aboard? A. No.

Q. Now, in your capacity as Chief Officer aboard the vessel, is it your responsibility to handle the cargo stowage arrangement?

A. No; not the arrangement.

Q. What specifically do you have the responsibility for in connection with the cargo?

A. Well, I presume I am responsible for the cargo, but not for the stowage of the cargo, to say which compartment is—it is going to go in.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard David Jansen.)

Q. Who has that responsibility?

A. They employ shore personnel.

Q. They employ shore personnel?

A. Yes, sir.

Q. However, do you keep a record of where each item of cargo is stowed on the vessel?

A. We have a cargo plan.

Q. And who maintains the cargo plan—do you draw that up?

A. No; that's given to us after the vessel is loaded.

Q. I see. Now, when you came in to the Luckenbach Terminals from Longview, what were the plans in connection with the cargo? What specifically was to be off-loaded or on-loaded?

A. Well, what was left of our westbound cargo was to be discharged here and commence [242] loading.

Q. And what did the westbound cargo consist of? A. General cargo.

Q. Well, if you can enumerate some of the items —was there paper? A. Yes; there was paper.

Q. And burlap bags? A. Burlap bags.

Q. Conduit? A. Conduit piping.

Q. What else, if you can recall?

A. Oh, reels and let's see, I would have to give it some thought.

Q. Was there any liquid cargo?

A. Liquid cargo in bulk.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard David Jansen.)

Q. Yes. Was there any liquid cargo packaged or drummed?

A. I wouldn't be able to say offhand. We had a reference as to what was down there.

Q. Now, was this cargo that was to be off-loaded —the westbound cargo, was that divided among all of the five holds? A. Yes.

Q. It was. And did you make any provisions when the vessel moored at the Luckenbach Terminal for any concentrated effort to be made on number 5 hold, in order to get to this missing ladder rung?

A. It was talked over with the Marine Superintendent, that [243] they were to sort of concentrate on number 5 aft so that we could do the ladder rung at the first opportune moment.

Q. I see. You discussed it with him, did you?

A. Yes.

Q. How often have you conducted fire drills on board the Robert Luckenbach?

A. Once in every week.

Q. Once every week? Now, is this in port or at sea?

A. Well, it all depends. We usually try to get it in port if we can, so we can put a boat in the water, but if we are not in port during that week, we just don't do it in the water.

Q. Now, I am speaking strictly of fire drill, not boat drill.

A. Fire drill also; once in every week.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard David Jansen.)

Q. And was a fire drill conducted while the vessel was at Longview?

A. No; no, the last fire drill was in Los Angeles.

Q. I see, and there wasn't any conducted on the morning of 2 April, when you arrived at Portland? A. No.

Q. Do you recall the date that it was conducted at Los Angeles?

A. Offhand, I think it was on a Friday. Now, I would have to—let's see—about the 28th.

Q. About the 28th of March, and that would be indicated in the [244] log book, whatever the date happened to be? A. Yes; yes.

Q. Now, when you conduct these fire drills, what specifically is done?

A. Stretch hoses and water on deck.

Q. And do you—what is your particular fire station?

A. With the emergency squad—the Bos'n and the Carpenter.

Q. And do you—what is your particular fire station?

A. With the emergency squad, the Bos'n and Carpenter.

Q. And in your past experience at these fire drills, how long does it normally take to get water on deck?

A. At the fire drill with water on deck? A minute, minute and a half.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard David Jansen.)

Q. A minute to a minute and a half. In other words, from the time that the fire alarm is sounded to the time that you have water at the scene would be about a minute to a minute and a half?

A. I wouldn't say more than a minute after the time water is requested.

Q. About a minute after water is requested. Well, now, ordinarily, when the fire alarm is sounded, is that the signal for water—the fire pumps to be started up right away or is this not done until you specifically call the engine room and request water?

A. A request for water is made. [245]

Q. I see. Does this, during your drills, normally coincide with the sounding of the alarm?

A. The request for water?

Q. Yes. A. No, not necessarily.

Q. It is not? A. No.

Q. What normally then is the procedure?

A. The fire drill is sounded and hose stretched, water requested on deck.

Q. I see. The water is requested then after the hoses have been led out? A. Yes.

Q. But as a general rule, this takes approximately a minute then from the sounding of the—or from the request for water until you get the water on deck? A. Yes.

Q. What were the conditions of the fire hoses and fire equipment on the Robert Luckenbach on the date of 2 April?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard David Jansen.)

A. What are the—— (interrupted).

Q. Conditions? A. ——conditions?

Q. Material conditions, were they good? Satisfactory? A. Yes, sir, as per regulation.

Q. Had you had any recent renewal of fire hose or any [246] other associated equipment?

A. I think I renewed number eleven hose a couple of weeks back.

Q. Now, number eleven hose would be for number eleven hydrant? A. Yes.

Q. And where is that particular one situated?

A. Poop.

Q. On the poop deck. Is that the after-most hydrant? A. Yes, sir.

Q. Would this be on the bulkhead and adjacent to the main deck or would it be on a deck level above? A. It is on the main deck level.

Q. On the main deck level? A. Yes.

Q. How long are these hoses?

A. Fifty feet.

Q. Standard fifty-foot lengths—two and a half inch? A. True.

Q. Now, when you came back aboard, you say about 10 o'clock or thereabouts? A. 10:30.

Q. 10:30, the Fire Department was still there?

A. Yes, sir.

Q. And did you observe whether or not any of the ship's hoses had been strung out? [247]

A. Offhand, no, I didn't inquire or look to see if they were.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard David Jansen.)

Q. Did you notice if there was any other of the ship's fire fighting equipment out?

A. No, I didn't notice.

Q. You didn't observe whether there were any fire extinguishers or oxygen breathing apparatus of ship's gear? A. No, I didn't see any.

Q. Did—is the ship equipped with oxygen breathing apparatus? A. Yes, sir.

Q. And what type of fire extinguishers does the vessel have about the deckhouse on the main deck?

A. About the deckhouse?

Q. Yes. A. The hydrant, that's all.

Q. Are there any extinguishers inboard—hand extinguishers?

A. There would be a CO_2 inside the resistor house.

Q. CO_2 A. Yes.

Q. Are there any soda and acid extinguishers that you know of? A. No.

Q. None on the ship at all?

A. Oh, on the ship, of course there are. [248]

Q. There are, but none topside?

A. None in the area of the fire.

Q. I see. Now, as I understand—— (interrupted).

A. That is the immediate area of the fire.

Q. I see. As I understand it, there is one hydrant that is situated to the starboard and just forward of number 5 hatch coaming, is that correct?

A. Forward and to the starboard of?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard David Jansen.)

Q. Yes. A. One forward of midships.

Q. Number 5—oh, midships?

A. Just slightly to the starboard of the center, but not starboard of the hatch.

Q. And that would be number 10, then, would it?

A. That would be number 10.

Q. Ten. Now, did you at any time, after you came back aboard, have the necessity of directing the securing of any of the ship's fire-fighting equipment, such as ship's hoses?

A. No, we didn't secure them at all. What hoses were out were left out—we went into the shipyard with them.

Q. Then there were ship's hoses out?

A. Yes.

Q. You stated earlier that you hadn't observed whether there were any ship's hoses out.

A. Not at that time, no. [249]

Q. I see, but you did later, is that it?

A. Yes.

Q. And they were left strung out right up to the time you went into the shipyard? A. Yes.

Q. Now, is there anything further, Mr. Jansen, that you feel you would care to say, which might lend light to this investigation as to the cause of the casualty or anything at all that you would care to say? A. As to the cause of the casualty?

Q. Yes.

A. Well, it was admitted to me by Mr. Bailey of Albina that the sparks started by a live welding

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard David Jansen.)
rod or welding gear being lowered down into the hold and striking against metal.

Q. Mr. Bailey specifically stated this to you, did he?

A. Yes, that was the next morning about 8:30.

Q. Did he, Mr. Bailey, indicate the source of his information?

A. No, he didn't expound on it. I just asked him what happened and that's what he told me.

Q. He didn't explain where he had heard this report? A. No.

Q. Have you received any report or discussed the casualty with Mr. Radovich?

A. Not to any great extent, no.

Q. Did he indicate that he was a witness to the start of the [250] fire? A. Yes, he did, yes.

Q. Did he tell you what he actually saw?

A. Yes.

Q. What did he say to you?

A. Well, I can't give it to you verbatim, of course.

Q. No.

A. But as close as I can remember. That he went back to check and see the extent of fire protection that was being given back in number 5 and when he arrived there, he seen an abnormally large flash and then smoke billowing out of the hold and he mentioned the fact to the men down below that there was smoke coming out and I am pretty sure they told him that it wasn't—there was no fire, that it was from the welding torch that this smoke was

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard David Jansen.)

from, and they told that same thing to the Third Mate when he insisted that they get out of the hold; that it was just from a welding torch.

Q. At any time following the fire, did you go down in the hold to examine the scene or—— (interrupted). A. Yes, sir.

Q. ——or the extent of damage?

A. Yes, sir.

Q. What did you observe when you went down?

A. Oh, the cargo damage, the various plates buckled and the ladder rung, of course, I looked to see if they had done [251] welding or not. I didn't see any evidence of welding done on the ladder rung at all.

Q. What ladder rung?

A. The one forward that was out.

Q. How did you happen to look at the one forward when you were of the opinion that it was the after ladder that had the rung missing?

A. Well, this was the next morning when I made the inspection. Of course, at that time, I realized it was the forward one, you know, when I went down.

Q. I see. You went down and observed that there was one missing on the forward ladder?

A. Yes.

Q. Did you notice whether there were any signs of welding or welding marks on the forward ladder which might have indicated to you that they had started the work?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard David Jansen.)

A. That is what I just meant by what I said. I looked to see if they had done—started any welding, and I observed none.

Q. I see. You didn't see any spark contact at any point at all?

A. No, I looked the ladder over well just for the—to see where the torch had struck the ladder.

Q. And you didn't see any such marks?

A. No. [252]

Q. Do you have anything further that you would care to say at this time, Mr. Jansen?

A. No, sir.

Q. Do you know who, if anyone, gave orders for the clearing of the cargo in the vicinity of the forward ladder?

A. As I stated before, Mr. Radovich said he would attempt to clear away the cargo that afternoon and concentrate on that area.

Q. On what area—on the forward or the after area? A. The after area.

Q. The after area? A. Yes.

Q. I see. Then as far as you knew, by the time you went ashore, it was still the after ladder that was the area that was going to be cleared for welding? A. Yes, sir.

Q. You stated that you observed no welding marks in the vicinity of the ladder rung that was missing. Did you observe any other contact points around the hatch coaming or anywhere else in number 5, which might have indicated that a spark had been struck by an electrode?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Richard David Jansen.)

A. I didn't look around the hatch coaming. I just looked at the ladder.

Q. I see, and you stated already that there was nothing indicated there? [253]

A. That any welding had been started.

Lt. Cmdr. Mason: Very well, sir. Thank you very much.

(Witness excused.)

Lt. Cmdr. Mason: It is close to coffee time. Let's take a break at this time.

(Whereupon, a recess was taken from 9:50 o'clock a.m. until 10:07 o'clock a.m., at which time the preliminary investigation reconvened.)

WILLIAM JAMES CAMPBELL

was called as a witness by the United States Coast Guard, and first having been duly sworn, was examined and testified as follows:

Examined

By Lt. Cmdr. Mason:

Q. State your full name and address, sir?

A. William James Campbell, 319 Molino Avenue, Long Beach, California.

Q. And what is your occupation, sir?

A. Bos'n on the Robert Luckenbach.

Q. What union are you with, Mr. Campbell?

Respondent's Exhibit No. 23—(Continued)
(Testimony of William James Campbell.)

A. National Maritime Union, sir.

Q. And how long have you been aboard the Robert Luckenbach in the capacity of Bos'n?

A. Five years, sir.

Q. Were you employed by the Luckenbach firm prior to that time? [254]

A. No, sir, the Grace Line Steamship Company.

Q. I see. How long have you been going to sea in all? A. Twenty-seven years, sir.

Q. And how long altogether have you sailed as a Bos'n? A. About seven years, sir.

Q. And were you aboard the Robert Luckenbach on the date of 2 April, 1958, the date of the fire? A. Yes, sir.

Q. Had you been ashore at all that day?

A. No, sir.

Q. Were you aware of any repairs to be made with relation to the ladder rung in number 5 hold?

A. No, sir, I wasn't.

Q. Were you familiar with any of the repairs that were to be made on the vessel?

A. No, sir, that doesn't come under my—— (interrupted).

Q. I see. Now, when the vessel moored at Portland on the morning of 2 April, what duties did you then perform, if any?

A. That is in the Port of Portland?

Q. Yes.

A. Well, we were chipping on the bow; chipping on the boat deck; painting and scraping in the reg-

Respondent's Exhibit No. 23—(Continued)
(Testimony of William James Campbell.)
ular routine of sailors' work. To go through the familiarities of where I had the men placed and the exact details of what they were doing would be—— (interrupted). [255]

Q. Did you have anything to do with the rigging of the cargo handling gear? A. No, sir.

Q. What, if anything, is your responsibility with respect to the cargo handling equipment?

A. Well, it is my duty, under the supervision of the Chief Officer to see that it is kept in proper condition and working order—to see that all repairs are made where necessary.

Q. And to the best of your knowledge, was it in proper working order? A. Yes, sir, it was.

Q. Had the running gear, booms and so on, been rigged prior to mooring at Luckenbach Terminal?

A. Now, when this ship—you are talking about when she left—— (interrupted).

Q. Left Longview?

A. ——Luckenbach Pier going to—where was she going?

Q. No, no, now, she left Longview and arrived at Luckenbach Terminal on the morning of 2 April?

A. Yes, that's right.

Q. And was the cargo handling gear rigged at that time upon arrival at the Luckenbach Terminal?

A. No, it was, the booms were wung in.

Q. The booms what?

A. Were wung—what we call wung in—they are swung in. [256]

Respondent's Exhibit No. 23—(Continued)
(Testimony of William James Campbell.)

Q. I see.

A. You see, when they leave one pier and go to another—— (interrupted).

Q. And then who swings them out?

A. The longshoremen, sir.

Q. The longshoremen do that? A. Yes.

Q. I see. A. They trim their own gear.

Q. Now, did you go ashore at all on that day?

A. No, sir.

Q. You did not? A. No, sir.

Q. And you were aboard when the fire broke out? A. Yes, sir.

Q. And what was your—what time and where were you at the time that you first realized that there was a fire aboard?

A. When I first realized there was a fire, I was going out to make a telephone call. I would say the time was 6:30 or twenty minutes to 7. I looked aft and I see Kand, the Second—Third Mate, moving in a sort of a fast manner back aft by number 11 fire hydrant. I also saw smoke coming out of number 5 hatch, so I rushed back to assist him and we got a hose strung out to—no, I didn't assist him. I saw there was a fire and went over to number 9 fire hydrant and removed a hose from there and I [257] carried it back, thinking there might be an extension needed and I laid it on deck and then helped Mr. Kand with the fire hose from number 11 fire hydrant, which is aft of number 5 hatch on the

Respondent's Exhibit No. 23—(Continued)
(Testimony of William James Campbell.)
portside. We strung the hatch over the—strung that hose over the hatch.

Q. I see. Now, you came down then to the gangway for the purpose of going ashore to make a telephone call? A. That's right.

Q. And that's when you observed smoke and—— (interrupted). A. That's right.

Q. ——was there any activity back there? Were there any people there other than the mate?

A. Just the—there was the two mates—there was Kand and Proctic, the Junior Third Mate.

Q. I see. And then, as I understand it, you went immediately to number 9 hose?

A. That's number 9 hose and carried that back to—— (interrupted).

Q. And that is situated where, sir?

A. That is situated right outside—forward of the starboard side of number 4 hatch forward.

Q. I see. And you actually strung out that hose, did you?

A. That's right. It was coiled up and I carried it back, sir.

Q. I see. Was it connected to the hydrant? [258]

A. Yes, sir.

Q. And so you unraveled the (interrupted)——

A. No; it is coiled up—flaked in that manner (indicating) on a rack—on a bracket. So I uncoupled it, put it under my arm and carried it back to number (interrupted)——

Q. You carried the length of hose back?

Respondent's Exhibit No. 23—(Continued)
(Testimony of William James Campbell.)

A. The coiled length of hose back.

Q. Then it wasn't secured to the hydrant?

A. It was, but I would have to let it go first. It was secured to the hydrant on (interrupted)——

Q. Was it coupled?

A. Yes; onto number (interrupted)——

Q. Oh, and what was your purpose of uncoupling it?

A. Because I had to get it back to number 5, sir.

Q. I see.

A. I had taken it back as an extension.

Q. Oh, as an extension? A. Extension.

Q. Now, I understand. And then you placed it down on the deck there, did you?

A. That's right, in a convenient place where it could be contacted.

Q. And then you assisted the Junior Third in (interrupted)—— A. The Third Mate.

Q. Oh, the Third Mate. [259]

A. Mr. Kand.

Q. That was Mr. Kand? A. Mr. Kand.

Q. In rigging number 11?

A. Number 11 hose, that's right.

Q. And was number 11 hose coupled to the hydrant?

A. It was coupled to the hydrant, sir.

Q. I see, and did it reach to number 5?

A. It reached to number 5 and ten feet leading.

Q. I see, and did you actually hang it over the hatch coaming? A. Yes, sir.

Respondent's Exhibit No. 23—(Continued)
(Testimony of William James Campbell.)

Q. And down into the hatch? A. Yes, sir.

Q. Could you observe anybody down there?

A. No, sir; the fog was too—the smoke was too dense.

Q. I see. Do you know if anyone was down there at the time? A. No, sir; I didn't.

Q. You didn't hear anyone talking down there?

A. But I heard Mr. Kand say that there was a man down there—a welder down there and that's all I know.

Q. I see. Now, at any time during the course of the proceedings there, did you hear anyone in the hold call out "fire" or "let's have water," or make any remark? A. No, sir; I didn't.

Q. I see. And then your only knowledge of a man being in [260] number 5 is what Mr. Kand has told you? A. Hearsay.

Q. How long would you say it was from the time you first observed smoke at number 5 to the time that number 11 hose was strung out and into number 5?

A. I would say it wasn't any more than seven minutes after.

Q. Seven minutes?

A. About seven minutes.

Q. Do you feel that it was that long—that it took seven minutes from the time you first observed there was a fire to the time that you put number 11 into the hold?

A. No; I don't suppose it would be that long.

Respondent's Exhibit No. 23—(Continued)
(Testimony of William James Campbell.)

Q. Did it appear to you to be fairly rapid?

A. That is a rash statement I made there, because number 11 hose is adjacent to number 5 hatch and it wouldn't really take that long. I would say about three or four minutes.

Q. All right. What did you do then, Mr. Campbell?

A. Well, I was holding onto the hose and there was no action so then the firemen came and I left the hose that I was holding and assisted the firemen.

Q. About how soon after you had stretched out number 11 hose to the number 5 hatch did the firemen arrive?

A. I would say it was about five or seven minutes.

Q. I see. So, in other words, then, you feel that there was five or seven plus three or four minutes for rigging number 11 [261] hose a total of maybe ten or twelve minutes between the time you first observed smoke to the time the Fire Department arrived, is that about right?

A. That's about right, sir; yes.

Q. Ten or twelve minutes would be a fair approximation?

A. To the best of my knowledge, yes.

Q. Now, at any time did you hear the fire alarm sound? A. Yes, sir; I did.

Q. The ship's general alarm? A. Yes, sir.

Q. When did this sound?

A. As soon as I observed the fire from the gang-

Respondent's Exhibit No. 23—(Continued)
(Testimony of William James Campbell.)

way. As I said, I was going ashore and as soon as I was going to go aft towards the fire aft, I heard the bells—the general alarm.

Q. Now, did you hear it again after that or was that the only time you heard it?

A. Well, then I didn't pay much attention to anything because I was more interested in working aft.

Q. I see. Now, when you first came back to the vicinity of number 5, you were on the portside of the ship, were you?

A. I was on the portside, yes, sir.

Q. And where was the Third Mate and Junior Third Mate located?

A. The Third Mate was working, as I said, by number 5—11 fire hydrant. [262]

Q. What was he doing—coupling the hose to the hydrant?

A. He was stretching it—getting it off its rack.

Q. I see.

A. And Mr. Protic, he was proceeding forward at a rapid pace. He was going rather fast when I passed him. Now, where he was going or what he was going to do, I have no knowledge.

Q. I see. And what was the condition of number 5 hatch, insofar as the tarpaulin, hatchboards and covering and so on were concerned?

A. Well, on the after end, I believe there was three pontoons taken off for the purpose of unloading cargo.

Respondent's Exhibit No. 23—(Continued)
(Testimony of William James Campbell.)

Q. On the after end? A. Yes, sir.

Q. And that left an opening of approximately what?

A. I would say about twelve feet. I really don't know what the width of the pontoons are, but I would say they are four feet, anyway.

Q. Four feet in width?

A. Rough guess on the measurements.

Q. I see. When you say twelve feet, you mean the width of the hatch thwartships?

A. That was the opening of the hatch now. These three pontoons off, I would say you would have (interrupted)——

Q. Off the after end? A. Yes. [263]

Q. So it was actually open from port to starboard side, the hatch, on the after end?

A. Yes; the pontoon reaches from port to starboard on the hatch, sir.

Q. And there were three of these off?

A. Yes, sir.

Q. So probably a total of twelve feet forward of the after end was open? A. Yes.

Q. Now, what was over the forward end?

A. Tarpaulins and there was a tent strung up there.

Q. There was a tent over it?

A. There was a tent strung up, but it wasn't strung up in orderly fashion—strung up in a haphazardly manner, just because we were coming up

Respondent's Exhibit No. 23—(Continued)
(Testimony of William James Campbell.)

from the other port, it wasn't rigged up in proper fashion.

Q. Were there any longshoremen in the vicinity?

A. There was one longshoreman boss, I believe, there.

Q. Where was he situated?

A. On the after winches, sir.

Q. On the after winch?

A. Working on the after winches there, with a tent or some sort, I don't know.

Q. I see. Was anyone working on the tarpaulin that covered the forward part of number 5 [264] hatch? A. No, sir.

Q. Was there anyone else present in the area when you arrived that you observed?

A. No; there was one of the sailors, he was stringing the hose on the starboard side—Goedig.

Q. Was he the Deck Maintenance Man?

A. Right, sir—Goedig—yes, Deck Maintenance.

Q. And he was rigging the hose from the starboard side from what hydrant, do you know?

A. He was running from number 10, sir.

Q. Number 10, and that is the one on the (interrupted)—— A. Starboard side.

Q. ——the starboard and forward of number 4?

A. That's right.

Q. What did you do next, Mr. Campbell?

A. It's starboard and forward of number 5, sir. That's 10.

Respondent's Exhibit No. 23—(Continued)
(Testimony of William James Campbell.)

Q. Oh, I see. Forward of number 5 starboard is number 10 hydrant? A. That's right.

Q. What did you do next, after stringing out the hose? You stated that you then assisted the Fire Department? A. Yes.

Q. What specifically did you do?

A. Well, they were getting hoses aboard and I tried to get—to help them get them aboard as fast as they could. They were [265] struggling by themselves and so I pitched in and helped.

Q. Did you hear anything mentioned about the fact that the ship was not getting water to the ship's hoses? A. No, sir; I didn't.

Q. Did Mr. Kand or Mr. Protic mention it?

A. They said, "We are not getting water," but I didn't question why or why not.

Q. Did you observe whether anybody brought any fire extinguisher to the scene?

A. Yes, sir; Mr. Protic did.

Q. He did bring a fire extinguisher?

A. When he first observed it, he brought a fire extinguisher to the scene of the fire and left it—placed it up on a pontoon on the hatch.

Q. I see.

A. That was on the starboard—portside, sir.

Q. Did you overhear anyone mention the suggestion of covering number 5 hatch with a tarpaulin?

A. Yes; I believe Mr. Kand said he wanted to do that.

Respondent's Exhibit No. 23—(Continued)
(Testimony of William James Campbell.)

Q. That he wanted to cover the (interrupted)——

A. Some remark about covering the hatch—said it would take too long to cover the hatch, for what purpose, I don't know what they were going to do.

Q. I see. Was any mention made of the use of the CO2 system in the hold? [266]

A. Mr. Kand mentioned the CO2 system, but then he wasn't sure if there was anybody in the hatch. Didn't know if there was a man in the hatch or not.

Q. Now (interrupted)——

A. He didn't think it would be wise.

Q. ——referring to this reported man in the hatch, did you ever observe anyone come out of the hatch? A. No, sir; I didn't.

Q. You did not? A. No, sir.

Q. So, as far as you know then, you are not positive that there ever was a man down there?

A. No, sir.

Q. And did you remain at the scene during the course of the fire? A. Yes, sir; I did.

Q. And up to the time that the firemen reported the fire out? A. Well, almost that.

Q. I see. Was your duty on that particular day of 2 April, were you assigned to day work?

A. Yes, sir.

Q. And what time had you actually gone off your day work schedule? A. Five o'clock, sir.

Q. Five o'clock? [267]

Respondent's Exhibit No. 23—(Continued)
(Testimony of William James Campbell.)

A. Five o'clock, yes, sir.

Q. And you had supper aboard, did you, before the fire? A. Yes, sir; yes, sir.

Q. Now, did you go ashore that evening at all?

A. Whenever the fire was completely out, then I went ashore, sir.

Q. And at about what time would that have been?

A. That would have been about 8:30, sir.

Q. About 8:30. Did you observe when you went ashore whether or not there were any fire hoses rigged to the dock installations?

A. No; I didn't, sir.

Q. You didn't see any? A. No, sir.

Q. Had you observed any earlier?

A. No, sir.

Q. Did you encounter any difficulty with the cargo handling gear that evening or observe anything unusual or out of the ordinary with respect to any of the runners or the winches or rigging?

A. No; I didn't. One of the longshoremen parted a runner aft, as far as I know.

Q. Did you have occasion to report to the mate, either Mr. Kand or Mr. Protic, the fact that one of the runners had parted? A. Yes, sir. [268]

Q. When was that?

A. It was just when the fire was first witnessed —this when he parted the runner.

Q. When had that runner parted? Not at the time of the fire, was it?

Respondent's Exhibit No. 23—(Continued)
(Testimony of William James Campbell.)

A. Just almost before the fire, sir.

Q. What time had the longshoremen knocked off?

A. I really don't know. I knew they were around. I don't know what time they knocked off that day.

Q. But the runner parted after they were gone?

A. Yes, because this longshoreman boss was working on it, for what purpose, I don't know what he could do.

Q. I see. He was working on the runner?

A. He was working with the winch, yes—the runner.

Q. Now, had you engaged in the fire drills held aboard the Robert Luckenbach in the past?

A. Yes, sir.

Q. And what is your fire station?

A. The fire station is the emergency squad.

Q. How frequently have you attended such drills? A. Once a week, sir.

Q. Once a week. And, as I understand it, the last drill held prior to this fire was in Los Angeles?

A. Yes, sir.

Q. Would that be correct? [269]

A. That's correct, sir.

Q. What did you say your station was?

A. On emergency squad, sir.

Q. On emergency squad, and that is under the supervision of the Chief Mate?

A. The Chief Mate in charge, yes.

Respondent's Exhibit No. 23—(Continued)
(Testimony of William James Campbell.)

Q. Do you have some particular item that you are required to handle?

A. The lifeline, sir.

Q. The lifeline? A. Yes, sir.

Q. Now, after the firemen arrived or at the time the firemen arrived, I should say, were there other crew members besides yourself and the two mates in the vicinity?

A. Yes; there were about eight sailors—seven or eight sailors on deck, sir, in the deck department. One fireman that I know of. How many of the steward's department, I have no knowledge.

Q. And also Goedig, the (interrupted)——

A. Goedig, the day man, yes, sir.

Q. ——Deck Maintenance? A. Yes, sir.

Q. And did they assist in any way?

A. Yes; they did. We got orders then from one of the firemen to remove the pontoons and tarps from number 5 hatch. [270]

Q. And did you proceed to (interrupted)——

A. Gave those orders to Kand and Kand gave the orders on to me to take the pontoons off. I took the winches and supervised the taking off of the pontoons, and stored them on the starboard side in an orderly fashion. We removed them all but one, the center pontoon for the convenience of the firemen to get to the fires.

Q. I see. How long would you say this took in all?

Respondent's Exhibit No. 23—(Continued)
(Testimony of William James Campbell.)

A. I would say it would take about ten to twelve minutes, sir—to remove the pontoons and tarps.

Q. And you say you use the winch for this purpose? A. Yes, sir.

Q. And how about this broken runner?

A. We use the forward winches, sir. The forward boom.

Q. I see, and the runner was on the after winch, was it?

A. That's right; after winch starboard—number 19 winch, sir.

Q. Now, in the meantime, while you were removing them, the firemen were proceeding with fighting the fire?

A. Yes; they had kept water down there from one of the—from the forward pontoon.

Q. How many hoses did they use, do you recall?

A. I would say they had all of five hoses down there, sir, to the best of my knowledge.

Q. Were they rigged from shore units—shore trucks? [271]

A. Yes, sir; they were using their own pumps.

Q. I see, and did you observe any fire boats to come alongside?

A. Yes; there was a fire boat on the starboard side, sir.

Q. And did he rig a hose at all?

A. I can't recall if he had a hose or not, sir.

Q. I see.

A. But I do remember one of the sailors calling

Respondent's Exhibit No. 23—(Continued)
(Testimony of William James Campbell.)

for a heaving line to take a hose on board. Now, whether they used a hose or not, I can't say, sir.

Q. Now, at any time thereafter, did you assist in the removal of any of the cargo?

A. No, sir.

Q. You did not? A. Not that I recall.

Q. Did the longshoremen return while you (interrupted)——

A. No, sir; the longshoremen knocked off that night.

Q. They had knocked off? They never did come back?

A. They did come down but they were not—sent home.

Q. I see. They didn't come aboard then?

A. No, sir.

Q. Now, when you came down by the gangway with the intention of going ashore to make a phone call, was there a gangway watchman there at the time? A. Yes, sir; there was. [272]

Q. And this was a Burns Detective man, was he?

A. Yes; uniformed watchman. Where he was from, I don't know.

Q. He wasn't a crew member, as I understand?

A. No, sir.

Q. Did you say anything to him at this time?

A. No; I didn't. I don't recall saying anything to him.

Q. Did you speak with him later? A. No.

Q. Or did he have anything to say himself?

Respondent's Exhibit No. 23—(Continued)
(Testimony of William James Campbell.)

A. I might say "hello" or something, but not in reference to the fire. I don't recall anything concerning the fire, no.

Q. Now, in the course of your experience at fire drills on board the Robert Luckenbach, has it actually been required at these drills that water is brought to the scene of the supposed fire at drill time? Do they actually arrange for water to be brought to the nozzle of the hose?

A. Well, the hoses are stretched out, sir.

Q. And water run through them?

A. And the alarm given, and it seems as soon as the alarm is given, the water automatically goes on.

Q. I see. What normally do you do? Do you open the hydrants and run the water through the nozzle over the side?

A. Yes, sir; that's right, sir.

Q. And approximately how long does it take between the time the fire alarm is given until the time that you actually have [273] water going over the side?

A. I would say it would take less than a minute. In fact, it is a very short time. Very short time.

Q. Now, prior to the fire, were you aware of any ladder rung missing in the number 5 hold?

A. No, sir; I had no knowledge of that at all, sir.

Q. None at all? A. No, sir.

Q. Did you ever come to realize that there was

Respondent's Exhibit No. 23—(Continued)
(Testimony of William James Campbell.)

a rung missing? A. No, sir.

Q. At any time?

A. No, sir. I didn't (interrupted)——

Q. How about after the fire? A. No, sir.

Q. Are you aware of it now?

A. I am aware of it now, sir.

Q. When did you first become aware of it?

A. Well, I had been—I heard them talking about it after the fire, wondering what was the purpose—what were they doing down there and somebody said it was a fire rung. That is only hearsay. I don't know whether it was a fire rung or not.

Q. I see. Did you at any time between the time that you knocked off watch for the day and up to the time when you observed the smoke back aft, did you, during that interval, at [274] any time observe welders come aboard the ship?

A. No, sir; I hadn't.

Q. Had you at any time during the day observed welding apparatus on the pier?

A. No, sir; I hadn't.

Q. Now, when you proceeded back to the scene of number 5, from which the smoke was emitting (interrupted)—— A. Yes, sir.

Q. ——did you observe any welding equipment at that time, or wires leading into the hold?

A. No; I didn't. I didn't observe any lines going across the deck. I didn't; no, sir.

Q. Are there, to your knowledge, "No Smoking" signs posted about the ship?

Respondent's Exhibit No. 23—(Continued)
(Testimony of William James Campbell.)

A. Yes, sir; on the forward and after ends of the resistor houses.

Q. Which are the houses between each of the cargo holds by—cargo hatches?

A. Yes, sir; they are conspicuously exposed.

Q. I see. Are there any normally posted in the cargo holds themselves?

A. Not that I know of, sir.

Q. Have you since made an examination yourself of the scene of the fire?

A. Not since then, no, sir. [275]

Q. Not since when? I mean, since the fire has been extinguished, have you been down in the hold at all? A. No, sir; no, sir.

Q. You have not?

A. Just to look down at the—putting the new plates in over there at the drydock, that's all.

Q. I see.

A. I didn't make an inspection, no, sir.

Q. Now, it was brought out earlier that a temporary ladder rung had been installed to replace that area on the forward ladder of number 5 where the rung—the original rung was missing.

A. Yes, sir.

Q. Did you have anything to do with the rigging of that temporary ladder?

A. No; that would come under the mate and the carpenter. The carpenter keeps the rung and the mate must have got the rung from the carpenter and installed it himself.

Respondent's Exhibit No. 23—(Continued)
(Testimony of William James Campbell.)

Q. Do you know offhand how many firemen appeared on board at the scene?

A. No; I'm sorry, sir; I haven't the slightest idea.

Q. Would it have been a large number? Was it, say, over five men?

A. Oh, there was over five firemen there, yes, sir.

Q. There were over five? Would there have been ten? [276]

A. I knew there was over five, but I wouldn't even try to guess at the number that was there.

Q. Now, when you first arrived at the cargo hatch and looked down, were you able to see anything at all down there? A. No, sir.

Q. Smoke was too thick?

A. Too dense, yes, sir.

Q. And I believe you stated earlier that at no time did you observe anyone come out of this hatch during the time you were there?

A. No; I didn't.

Q. Is it possible that someone could have been down there and came out without you observing him or were you keeping a watchful eye on the hatch at all times after your arrival?

A. I wouldn't even make an attempt to say, sir. I wouldn't.

Q. Now, is there anything further that you would care to add, Mr. Campbell, that you feel might throw light on this investigation, that hasn't already been brought out by the questioning?

Respondent's Exhibit No. 23—(Continued)
(Testimony of William James Campbell.)

A. No; there isn't. There isn't anything more that I can help you with. All the questions you asked, I answered, so there isn't anything I can help you with now.

Lt. Cmdr. Mason: Very well, sir; thank you, very much.

A. Thank you.

(Witness excused.)

Lt. Cmdr. Mason: That looks like it. We will adjourn until [277] 1:00 o'clock.

(Whereupon, an adjournment was taken from 10:35 o'clock a.m. until 1:05 o'clock p.m., at which time the preliminary investigation reconvened.)

Afternoon Session

CARL L. JOHANSON

was called as a witness by the United States Coast Guard and, first having been duly sworn, was examined and testified as follows:

Examination

By Lt. Cmdr. Mason:

Q. Would you please state your full name and mailing address, sir?

A. Carl L. Johanson, 6220 S.W. Beaverton Highway.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Carl L. Johanson.)

Q. And how do you spell that last name, Mr. Johanson? A. J-o-h-a-n-s-o-n.

Q. And how are you presently employed, Mr. Johanson? A. Previously?

Q. Presently?

A. Oh, I'm guard with Burns Detective Agency.

Q. I see. How long have you been working for them? A. Well (interrupted)——

Q. Approximately?

A. ——I have worked steady, but then it is a little over a year—more than a year.

Q. I see. Now, as I understand, you were standing gangway [278] guard on board the Robert Luckenbach on the evening of 2 April when the vessel had a fire aboard? A. Yes.

Q. And what time did you first board the vessel, Mr. Johanson? A. At 4:00 p.m.

Q. I see, and did you relieve somebody at that time? A. Yes; I did.

Q. And when was your watch to run until?

A. From 4:00 to 12:00.

Q. From 4:00 to 12:00 midnight? A. Yes.

Q. I see. Now, were there any specific duties which were assigned to you?

A. Well, my duty is the gangway watch; then, of course, if anything comes up like a fire—if we see any fire or anything like that, we are to report it, of course, to the Fire Department.

Q. I see. Now, when you speak of gangway

Respondent's Exhibit No. 23—(Continued)
(Testimony of Carl L. Johanson.)
watch, does that mean that you obtain the identity of people boarding and leaving the vessel?

A. Yes.

Q. And do you search packages and that sort of thing?

A. Well, no—unless a thing that is suspicious—the sailors come aboard, you know, with little packets, of course, we never question that, no. [279]

Q. And what form of identity do you normally require of people boarding the vessel?

A. Well, unless they have business on the boat, they are not employees, longshoremen or workers, or members of the crew, or longshoremen, they have to have a pass from Mr. Radovich, the Port Superintendent. That is at the Luckenbach Dock.

Q. I see, and do you require that they produce this pass?

A. Yes; unless they are officials that I know (interrupted)——

Q. That you recognize?

A. Of course, like Mr. Piper or anyone like that, of course, then I just don't question them at all.

Q. Now, from 4:00 o'clock on, did you spend all of your time right at the gangway?

A. Oh, yes. Well, I was walking back and forth in front there—might have been a few feet on one side or few feet on the other.

Q. Yes, but on board the vessel itself?

A. Yes; yes.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Carl L. Johanson.)

Q. I see. And was there a lot of passage of people back and forth over the gangway?

A. Oh, yes; there is always a lot of longshoremen and the Albina workers and the crew on the boat and the Luckenbach officials and the checkers keep on running back and forth all the time and the walking bosses and so on. [280]

Q. Do you keep any record of people boarding or leaving—like a log book or check on or check off system?

A. Oh, heavens, no, that wouldn't be possible. You would just run back and forth all the time.

Q. Now, approximately what time if you recall did the longshoremen knock off?

A. At—from the hatch—from hatch 4 and 5, they covered the hatches up and they got through, it was, oh, approximately ten minutes before 6:00—eight or ten minutes before 6:00 when they got all through and went ashore.

Q. And how about the men from the forward hatches?

A. Oh, well, they didn't leave until 6:00 o'clock.

Q. They didn't leave until, say, about five or ten minutes after the other group aft?

A. Yes.

Q. I see. Do you know offhand approximately how many men were in the group that had been on numbers 4 and 5 hatches?

A. Oh, no; no, no, we never (interrupted)——

Respondent's Exhibit No. 23—(Continued)
(Testimony of Carl L. Johanson.)

Q. Well, what I am getting at is, were there twenty men or five men or fifty?

A. Oh, probably around twenty, I would say.

Q. Around twenty? A. Yes.

Q. I see. And you stated that before they left, they covered up the hatches? [281] A. Yes.

Q. Now, did they completely cover over four and five?

A. No; number four was completely covered but number five, to tell you the truth, I didn't go back there to look, because it really isn't any of my business.

Q. I see.

A. I think—of course—I think that they left the opening there for the welders to get down, you see, when the Albina welders came to work.

Q. I see. Well, now, what made you think that they left it open? Did you think that they had left it open at that time or you just think so now?

A. Well, I think so at that time and I still think so because although I actually didn't see the welders going down in the hatch, I understood they were there.

Q. I see. A. Yes.

Q. And now, speaking of these welders, when did they come aboard?

A. They came aboard just around about 6:00 o'clock.

Q. About 6:00? A. Yes.

Q. Was this before or after the longshoremen from number 4 and 5 had left the ship?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Carl L. Johanson.)

A. Oh, that was after. [282]

Q. That was after? A. Yes.

Q. And how many welders were there altogether?

A. I think there were two welders and their boss—their foreman. It was Mr. Lester—Lester Smith.

Q. Do you know him personally or from previous occasions? A. Well, yes; yes.

Q. How did you recognize these men as being welders?

A. Oh, that's easy, because they have their hoods, you know, that they put over their head when they weld, you know, and they carry that always under their arms so that we can always tell.

Q. I see. And did they furnish any identity to you when they came aboard?

A. Oh, no, no. We never question the Albina workers.

Q. I see. You recognize them as being Albina workers? A. Yes; yes.

Q. And then you let them pass aboard?

A. Oh, yes; yes.

Q. And do you know whether Mr. Radovich was aboard at this time? A. He was.

Q. Had he boarded just previous to that, or (interrupted)——

A. I don't remember exactly how long before he came aboard. Of course, he runs back and forth all the time, too, so I [283] never pay any particu-

Respondent's Exhibit No. 23—(Continued)
(Testimony of Carl L. Johanson.)

lar attention to the time, you see, when he comes and goes.

Q. Now, when these welders came aboard, other than their helmets, did they have any other equipment with them?

A. Yes; they had one of these trucks, you know, where they had a lot of hoses and things on that they parked on the dock right in front of hatch number 4.

Q. They parked it there, you say?

A. Yes; yes, right on the dock there and Mr. Smith, the foreman, he was running back and forth all the time and I—connecting up the hoses, I guess or whatever there was, and I didn't pay particular attention to just exactly what he was doing.

Q. Did this appear to be an electric generator—welding generator?

A. I don't know—I don't know what it is.

Q. But you saw some equipment on a dollie, was it, on wheels?

A. Well, a kind of—yes, quite a big truck, about as big as from here over to the wall there.

Q. Indicating a distance of approximately eight feet—ten feet? A. The length of the truck?

Q. Yes.

A. Yes. About maybe eight feet, something like that.

Q. I see. And then, these welders, they came aboard and what [284] did they do then? Did they go aft? A. They went aft, yes.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Carl L. Johanson.)

Q. I see. And then how long after that was it before you were aware there was a fire aboard?

A. Well, I—Mr. Radovich came by me. It was shortly after 6:00 o'clock—shortly after the welders got there and he went back to the rear end of the boat and to hatch, I guess, number 5 and all at once I noticed him coming running full speed and ran upstairs to the officers and he didn't say anything to me at that time, but just a second and he come down again and he said there was fire on the boat, and I noticed the crew came out and there was quite a commotion and I—he was running ashore and I hollered to him, "Do you want me to call the Fire Department," and, of course, I knew he would, so I wasn't quite sure whether he said no or yes, but I knew that is what he was running ashore for, and so it was only about—that was about 6:15—approximately 6:15, and then it was about fifteen minutes later before the Fire Department got there.

Q. Fifteen minutes later?

A. I would think—about twelve or fifteen minutes.

Q. You didn't happen to keep any record of the times on this, did you, by any chance?

A. Well, approximately. Not to the minute, you know—we never have to the minute, but approximately, I think I wrote [285] it down in my log as 6:30.

Q. What do you use for keeping track of the

Respondent's Exhibit No. 23—(Continued)
(Testimony of Carl L. Johanson.)

times? Do you carry your own watch or do you use the ship's clock?

A. No; I carry my own watch.

Q. Carry your own watch? A. Yes.

Q. And it's fairly accurate, is it?

A. Oh, yes; yes.

Q. And you judge it was about 6:15 that Mr. Radovich ran ashore?

A. Went down—yes, to call the firemen.

Q. And between the time that Mr. Radovich ran past you and went topside to, as you felt, to see the officers (interrupted)—— A. Yes.

Q. ——and the time he came down and crossed the gangway and reported fire, had you observed any smoke or suspected any fire?

A. No, no, no; I hadn't observed. I understood he just stuck his head down there in the hatch and he could smell smoke.

Q. I see.

A. And I couldn't see any smoke until quite awhile after he had left.

Q. I see. Now, did you do anything or did you just remain at the gangway? [286]

A. No; I had to remain at the watch—at the gangway, you see; that's my job.

Q. I see, and you feel it was approximately fifteen minutes after Mr. Radovich went ashore that the firemen came? A. Yes.

Q. And this consisted of fire trucks, did it, and a group of men?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Carl L. Johanson.)

A. Yes. Of course, I could only see one fire truck on the dock, you know. The rest of the fire trucks were parked out in the street—I was at the dock, so how many were there I don't know.

Q. I see. Now, at any time did you hear the ship's fire alarm sound?

A. Yes. Well, now, I couldn't swear to it, but I am almost positive that I heard the alarm.

Q. Do you recall just when this was?

A. Well, right after Mr. Radovich got up there to report to the officers.

Q. I see; I see. Now, between the time Mr. Radovich went ashore to—presumably to telephone for the Fire Department and up until the time the Fire Department arrived, did you observe any activity or action on the part of the ship's force?

A. Oh, yes; there was lots of the crew came there and I—I suppose that they were connecting up the hose. Now, I couldn't say what they were doing because I was just standing [287] by the gangway watch, you see, I didn't want to have anybody come on the ship, you know, especially during all the commotion, so the mates were there and quite a few of the crew and I know they were running between the hatch and over to the bridge.

Q. I see.

A. But what they were doing at the hatch, I don't know, because I didn't go over there.

Q. Did you notice when the welders or if the

Respondent's Exhibit No. 23—(Continued)
(Testimony of Carl L. Johanson.)
welders rigged the wires or hoses as you referred to them and brought them aboard the ship?

A. When, you say?

Q. Yes; did you observe when they did it?

A. Well, no; I really didn't, because this—the foreman, Lester Smith, I guess who was doing the connecting, was just running constantly back and forth there and, of course, I know him so well that I just—I just didn't pay any attention to really what he was doing.

Q. Now, had you at any time prior to the arrival of Mr. Smith and the welders, had you been advised that welders would be aboard the ship?

A. I—if I recollect right, welders were aboard forward on the boat at the time I came on, working, doing some work there. So I know that—I knew that the Albina workers were on the ship, that (interrupted)—— [288]

Q. That there were welders aboard?

A. Yes, but that these particular welders that was coming to hatch 4 or 5, I wasn't informed anything about them.

Q. Now, that was a different group, though, was it not, from those that had been welding forward?

A. Well, yes, of course, Mr. Smith, I think, the foreman, he was the foreman for all of them, but during this time when the two welders came there at 6:00 o'clock, he was with them there constantly, just running back and forth there.

Q. I see.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Carl L. Johanson.)

A. But I think that he is the foreman for all the welders on the boat.

Q. Mr. Smith?

A. Yes, Lester Smith. And there is another Smith there. He is also a foreman. I think he is under the other—the Lester Smith.

Q. I see. Now, did you have occasion to report the fire to your superiors?

A. Well, Mr. Radovich is my superior and, of course, he was right there all the time so, of course, I didn't have to make any report because he knew all about it.

Q. I see.

A. I just made out a report afterwards—a fairly complete report and sent to Mr. Cruikshank (phonetic), my manager at the Burns [289] Detective.

Q. That report indicated that a fire had occurred aboard the vessel? A. Yes; yes.

Q. So actually you didn't take any part in the extinguishment of the fire?

A. Oh, no; no, no, no.

Q. And were you still aboard up until midnight, your scheduled time to leave? A. Yes. Yes.

Q. And do you recall the Chief Mate returning aboard while you were on watch?

A. Yes; the Chief Mate—I know the Captain came aboard 10:00 o'clock.

Q. He returned at 10:00?

A. Yes, and I think the Chief Mate and the

Respondent's Exhibit No. 23—(Continued)
(Testimony of Carl L. Johanson.)

Chief Engineer, if I recollect right, they didn't come until later.

Q. But you were still on board when they came back?

A. Yes; I was aboard until 12:00 o'clock.

Q. And you saw the Chief Engineer and Chief Mate return before you went off watch?

A. I have it written in my log. I think it was before I (interrupted)——

Q. Do you have that log with you now?

A. No; I haven't. I have it in my—no, I don't have it in my car because we turn it over to the next one that relieves [290] us, you know. We turn all the records over to him.

Q. I see. You are not sure at this time but you think that the Chief Mate and Chief Engineer returned before you went off watch?

A. Yes; I am almost positive they did.

Q. And the Master definitely came back at 10:00 p.m.? A. Yes; yes.

Q. Did you make any report to any of those gentlemen when they returned?

A. Well, I just told the Captain. I said, "You missed lots of excitement here," and he says, "What is it?" "Oh," I said, "there has been a fire in the hold." And he went over right away. He didn't ask me any more questions and I didn't talk any more to him about the fire.

Q. I wonder if you could estimate for me, according to your own recollection, approximately

Respondent's Exhibit No. 23—(Continued)
(Testimony of Carl L. Johanson.)

how much time elapsed between the time that Mr. Radovich left the gangway presumably to call the Fire Department—from that moment until the moment that the Fire Department had water at the scene of the fire?

A. That was approximately fifteen minutes.

Q. Approximately fifteen minutes?

A. Yes.

Q. Now, do you have any further knowledge of information relative to this casualty, Mr. Johanson, that you feel would prove pertinent to this investigation that I haven't already [291] brought out by questioning? A. Any casualty?

Q. Any further knowledge relative to the incidents of this casualty—of this fire (interrupted)——

A. Oh, no, just (interrupted)——

Q. ——that I haven't already gotten by questioning?

A. I heard just a lot of gossip and talk around there and, of course, there, I don't pay much attention to it.

Q. Did you observe the welders when they later left? A. When they left?

Q. Yes.

A. No; there was such a commotion there and I was so busy trying to keep the photographers and the pressmen off of the ship that I—I had my hands full.

Q. Did you have orders to do this?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Carl L. Johanson.)

A. Oh, yes; I did.

Q. Who gave you those orders?

A. Mr. Radovich and Mr. Piper. I didn't tell them they couldn't get onto the dock. The papers said that I stopped them coming on the dock, too, but that wasn't so. I just told them to stay off of the ship. I didn't say anything about the dock.

Q. Do you have anything further that you would like to add, Mr. Johanson?

A. No; I don't think I have. [292]

Lt. Cmdr. Mason: Very well, sir. I believe that will be all. I want to thank you very much for coming down here.

A. You are welcome.

(Witness excused.)

Mr. Wood: Well, 9:00 o'clock tomorrow morning?

Lt. Cmdr. Mason: 9:00 o'clock tomorrow morning.

(Whereupon, at 1:25 o'clock p.m., the preliminary investigation adjourned.) [293]

Fourth Day—Morning Session

(The preliminary investigation reconvened at 9:07 o'clock a.m., Tuesday, April 8, 1958.)

Respondent's Exhibit No. 23—(Continued)

KENNETH W. POST

was called as a witness by the United States Coast Guard, and first having been duly sworn, was examined and testified as follows:

Examination

By Lt. Cmdr. Mason:

Q. Would you please state your full name and mailing address, sir?

A. Kenneth W. Post, 5908 Southwest Nebraska Street, Portland, Oregon.

Q. And as I understand it, Mr. Post, you are connected with the Portland Fire Department; is that correct, sir?

A. Yes; I am Assistant Chief.

Q. You are the Assistant Chief. Do you have a rank designation? In other words, would that be "Captain" rank or (interrupted)——

A. No; it's Assistant Chief; that's my rank.

Q. I see. And how long have you been employed with the Portland Fire Department?

A. Thirty-four years.

Q. And how long have you held the post of Assistant Chief? [296] A. A year.

Q. One year? A. One year.

Q. Did you serve on any other fire department prior to your service with the Portland Fire Department? A. No; I didn't.

Q. And, Chief, what is your background of training in this field?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Kenneth W. Post.)

A. Well, we all come up through the ranks. I started as a fire fighter, then a Lieutenant, Captain, District Chief and then Assistant Chief, and it's all—in our department—it's all Civil Service—by examination.

Q. Are there any specific schools that you've attended relative to the type of duties you perform, such as in fire fighting?

A. Oh, yes; we have schools all the time, and I at one time went through four years of a college we had here in the department, then we have schools all the time.

Q. I see. And during your career with the Portland Fire Department, have you had any previous experience with shipboard fires?

A. Yes. I was to the—one I can think of—just at the start of the war, we had a fire on the—I can't think of the name of the ship, but anyway, it was being overhauled by the Willamette Iron and Steel and converted into a—some kind of [297] a Navy ship. We had a fire on that one. We had a fire on a carrier that they were dismantling at the shipyard up here (interrupted)——

Q. Did any of these fires involve cargo?

A. No; I believe not; not that I can remember.

Q. In other words, then, would it be safe to assume that prior to 2 April, you have had no experience with the extinguishment of cargo fires aboard merchant vessels?

A. Not that I can recall.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Kenneth W. Post.)

Q. I see. Now, as I understand it, on 2 April, you proceeded in connection with a fire that occurred on board the S.S. Robert Luckenbach at the Luckenbach Terminal in Portland, is that correct, sir? A. That's right.

Q. When did you first receive word of fire on that vessel?

A. Well, when the alarm came in, which was at 6:20 p.m., it was transmitted to the engine house—the alarm—and normally I don't take a fire like that, but one of my duties is—I have charge of the whole city the day I'm on, and it sounded like it might be a serious fire, so I took it; I answered over there, and I arrived there about the same time as the District Chief arrived. Now, you see (interrupted)——

Q. And who is the District Chief, sir?

A. That's Roth.

Q. Is that the gentleman that appeared with you today? [298]

A. That's right.

Q. Do you know approximately what time you arrived at the scene?

A. Well, I imagine it takes about four minutes to get over there.

Q. So that would be about 6:24 that you (interrupted)——

A. That would be close; it might be a minute either way.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Kenneth W. Post.)

Q. And what equipment did you take with you, sir?

A. What answered on the first alarm over there is three engine companies, a fire boat, and a truck—ladder truck. That's the assignment down there on a first alarm.

Q. I see. And can you tell me approximately how long after you arrived at the scene that water was directed on the fire?

A. I imagine the first water got in there—would be three minutes. That would be plenty long enough—about three minutes.

Q. Three minutes after your arrival?

A. Yes.

Q. Which would be approximately seven minutes in all, from the time that you first received the alarm? A. That would be about right.

Q. Now, I'll ask you, Chief, if you would just describe in your own words, what you saw and what occurred starting from your first arrival at the Luckenbach Terminal.

A. Well, of course, naturally the first thing I did was to [299] proceed to the ship to see what was on fire, and when I got there, the fire was in an after hatch, and there was quite a little fire in the hatch. Now the hatch was practically covered except for two—I don't know what your name for them (interrupted)——

Q. Pontoons, I believe.

A. The pontoons were open in the forward end

Respondent's Exhibit No. 23—(Continued)
(Testimony of Kenneth W. Post.)

of it, and the after end, I believe there were three pontoons off. The rest of the hatch was covered.

Q. There was a canvas tarpaulin also over it?

A. There was a canvas tarpaulin over the top, that's right.

Q. I see; sort of a tent arrangement.

A. That's right. So immediately I looked down in there to see what it was and ordered the lines to cut it off from the top if we could see (interrupted)——

Q. Before we proceed, what did you see, smoke or fire or both? A. Smoke and fire.

Q. You did see both? A. Yes.

Q. And with respect to the fire itself, did it appear to be concentrated on any one particular part or place?

A. Yes, it did. It was from the hatch part forward, up towards the next bulkhead, and the fire eventually turned out—that's where all the fire was. [300]

Q. And was it spread on both sides of the vessel —that is, port to starboard, or was it just (interrupted)——

A. No, mostly on the port side of it.

Q. The in-board side; the side to the pier?

A. The side next to the pier; then it got out about as far as where the center ladder goes down.

Q. Now, when you first appeared at the scene of the hatch, did you observe any ship's fire hoses strung out?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Kenneth W. Post.)

A. No, I didn't. I didn't look for any, and they may have been there, but I didn't see them—they could have been there.

Q. I see. Did you see any activity going on? Were there any other crew members or anyone present at the scene that you observed?

A. Yes, I contacted the Captain pretty—very little time. That's one of the things you want to do—is to try to find out what was burning and what the cargo was and if there's any other way to get down there besides the hatch. I contacted him pretty early.

Q. Now, merely for the record, Chief, and I don't mean to try to trip you up on this at all, but it's my understanding that the Captain, himself, was not aboard at this time. Now is it possible that the person you contacted might have been the Watch Officer? I mean did you make any inquiry as to the specific identity of the person you contacted?

A. No, I didn't. I was looking for a ship's officer, and (interrupted)—— [301]

Q. You did contact who you assumed to have been the Captain?

A. Yes. It might have been the First Mate; I don't know.

Q. I see. Well, that's all right, sir. Now, if you'd proceed.

A. Well, then I could see that we wasn't getting anything past there, so we immediately put lines down there to cut it off, and ordered circulators, and

Respondent's Exhibit No. 23—(Continued)
(Testimony of Kenneth W. Post.)

circulators are what we call—we put them in and they just whirl at the end this way (indicating) and lowered them down. We put two and finally put a third one down there in the hold.

Q. Is this a connection that you make at the end of the hose?

A. At the end of the hose, yes; it's not like a straight nozzle.

Q. What do they actually do; do they throw out a fog arrangement or a spray?

A. Spray arrangement. They call them a "Bresden Nozzle"—is the name for them, and then I know that I must have contacted one of the ship's officers. I don't know whether it was the Captain or the First Mate, but I asked him to remove this canvas because it wasn't allowing the smoke to get out of there properly. After that was over, to see that the lines were on. You see, all of these companies, they report to me always, and where they want lines and so forth, and had them standing around there, and then—I don't know what the time is or anything—I had them remove these pontoons. As soon as we [302] removed the pontoons, then we was able to start the lines to going down into the ship. Of course, I wouldn't allow anybody to go down there unless they had a self-contained mask on. There's always the danger in the bottom of a ship of an oxygen deficiency and men get knocked out, so I had the men pull these pontoons up and everything—now, who did that—I

Respondent's Exhibit No. 23—(Continued)
(Testimony of Kenneth W. Post.)

believe it was the ship's crew; I don't know who did it.

Q. In either event, it was someone aboard the ship there, at the scene at the time?

A. Yes, and I'm sure—I thought it was the Captain I was talking to at that time. I'd know him if I saw him—the fellow I talked to. Well, then it was just a matter of salvage work from there on. We put the fire out very quickly, and (interrupted)——

Q. How many hoses did you put down into the hold? A. Besides these "Bresdens"?

Q. Yes. There were two "Bresden" as I understand it.

A. That's right. Let's see—oh, I think about seven.

Q. Now, up to this time, no one had gone down into the hold as far as your crew was concerned?

A. No, not as far as our crew; not until these pontoons were removed.

Q. Did you observe anyone come out of the hold from the time you first arrived at the scene?

A. No. [303]

Q. Do you know whether anyone had been down in there when you first arrived?

A. No, but I—now, also, by the way, I heard these welders, and I heard them talking—what they was doing—that's how I had an idea on how that fire started. I heard them talking. Who they was talking to, I don't know—there was two welders standing there.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Kenneth W. Post.)

Q. They were up on deck?

A. They were up on the main deck.

Q. No one down in the hold? A. No, no.

Q. And approximately how long would you say it was before you felt the flames to be extinguished?

A. Well, I haven't got that time, but I—— (interrupted).

Q. Well, if you could just—— (interrupted).

A. Oh, I would roughly say an hour.

Q. About an hour?

A. It's pretty hard to determine time, because we don't look at time, you know.

Q. Were you running water during all this time, do you know?

A. Oh, yes; to these circulators.

Q. I see.

A. And there was a couple of other lines, that whenever they could see the flames, they would shoot down, but the flame was being held back under this second deck. [304]

Q. I see.

A. It was only holding; it wasn't extinguishing too much—just holding it in check.

Q. Did anyone speak to you relative to pumping out the water as it went in, or did you talk to anyone?

A. No, but I looked the ship over and it was pretty near empty and there was no danger for a long time of putting too much water into it. I also ordered a line into the hatch ahead of that because

Respondent's Exhibit No. 23—(Continued)
(Testimony of Kenneth W. Post.)

the bulkhead there was getting hot, and practically caught some of the duffel afire up against that bulkhead.

Q. Did you also have apply water into the hold forward of that?

A. Yes, I had a—what we call inch and a half—a small line, and they did extinguish where it started in that duffel a little bit.

Q. I see. Did you make any inquiry while you were aboard as to why no positive of extinguishment had been carried out prior to your arrival?

A. No, I didn't.

Q. Were you aware of the fact, or were you made aware of the fact that the ship's fire main system was inoperative?

A. No, I never knew whether it was or it wasn't; I never inquired. I always understood that they had a—most of these ships have a CO_2 [305] arrangement.

Q. Had anyone mentioned the CO_2 arrangement to you on this particular occasion?

A. No, but I figured it wasn't working, or they'd have had it going before we got there.

Q. I see, but no actual discussion was made concerning this?

A. No, I never made any discussion.

Q. Now, approximately an hour, you stated, to extinguish the fire; after which, did you leave, and leave the matter then in charge of—— (interrupted).

Respondent's Exhibit No. 23—(Continued)
(Testimony of Kenneth W. Post.)

A. Oh, I imagine about half an hour later, I was seeing that the salvage operations were starting and we'd talked to—now, that's why I think it was the Captain—talked to him and asked him about getting somebody to move that cargo that was down there. We couldn't put it out on the dock. Well, they said they'd get hold of some stevedores and a barge and put it out into this barge. The salvage operation was this; we had a stack of burned stuff here (indicating) and over here was some paper, and you had this hole in between which was full of water.

Q. Now, when you say "here" and "here," does that mean forward and aft?

A. Well, the paper was aft, and where the fire was was forward of that, and between there was a space, and I imagine there was about four or five feet of water there. Well, they started to pull the top off and put it down [306] in there, and as soon as they got down there, they found out the fire ate way down in, clear to the water line, in the back. Then it had to be removed to get all the fire out in there—smouldering fire.

Q. And you stated that you stayed about another half hour to oversee this operation. Did any of your own men go down into the hold to assist on this, or was that—— (interrupted).

A. Oh, yes; they were all—the regular crews were down in there.

Q. They were.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Kenneth W. Post.)

A. While I was there, there wasn't anybody but firemen in the hold.

Q. I see. A. At any time.

Q. I see. How soon after your arrival and application of water, did your crew go down into the hold?

A. Well, that's what I said might have been an hour; I don't know—as soon as they got the pontoons out, we went right down.

Q. Approximately how many men, or do you know exactly how many men that you had?

A. That went down at that time?

Q. No, that you had—that reported to the fire.

A. Well, you see, about—oh, I imagine it was ten minutes after I looked around good, I put in what we call a "Third [307] Alarm," and a Third Alarm in that case calls for three more fire engines—on a second is two—five—five more engines, another fire boat and another truck, and of course, a few auxiliaries go with it, such as tenders, squad wagon, and a compressor, but the main thing is we get five more engines and a fire boat.

Q. Did they all come?

A. Oh, yes; they all came. Now, we—I had about three companies standing by that never did any work or anything, but we always like to have a little insurance there in case it gets away from us.

Q. I see.

A. A little more than we figured.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Kenneth W. Post.)

Q. Was the fire boat at the scene when you arrived, or did they arrive later?

A. I think they must have arrived—that I don't know, whether they arrived first or not, because when they arrived, then they came up and reported.

Q. I see, and did they rig hoses, also?

A. No.

Q. They did not?

A. As far as I know they didn't. Now, the first boat, I told them to stand by and not to put in any hoses.

Q. Now, were you still aboard while some of the cargo was actually removed from the hold? [308]

A. No; no, I had left before they had removed any cargo. Chief Roth stayed there pretty near all night on it.

Q. Now, would it be safe to assume then, that the initial fire was under control and pretty much extinguished by 7:27 or 7:30?

A. Oh, yes; yes—I think so—within ten minutes after the hatch covers—the pontoons were pulled out—it was under control.

Q. I see. Have you since been back aboard the ship yourself for anything?

A. No, I haven't.

Q. You have not?

A. The other Chief has.

Q. Did you make any examination of the hold yourself, before you left the vessel?

A. Well, yes; I was down in there.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Kenneth W. Post.)

Q. You did go down into—— (interrupted).

A. Oh, yes; I was down in there; sure.

Q. Did you notice the nature of the cargo?

A. Well, to me, it appeared to be mostly paper stuff. I even saw some mops—string mops—down in there, too. It looked like school supplies down in there and everything else; I don't know what it was down in there. It was pretty much junk when I saw it.

Q. Do your duties or your responsibilities as Assistant Fire [309] Chief require that you make any investigation relative to the cause of the fire?

A. No, no. The District Chief does that.

Q. I see.

A. And if he can't determine it or anything, then he calls one of our investigators; we have regular fire investigators we call.

Q. I see. Do you know whether this was done in this case?

A. Well, I know the District Chief probably inquired around, because he has to make a report on it. I don't have his report with me.

Q. I see. What is the District Chief's name?

A. Roth.

Q. Oh, that is Mr. Roth?

A. Yes, who's with me.

Q. Fine; thank you.

A. We call them District Chief or Battalion Chief.

Q. I see.

A. The Battalion Chief of a district.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Kenneth W. Post.)

Q. Now, when you arrived at the scene and observed the situation, you stated that you immediately brought hoses into the scene to apply water. Did the situation appear to you such that immediate water was essential to the extinguishment of this particular type of fire?

A. Yes, you have to put water on it to put it out, if you [310] don't have anything else there to put it out with. We don't know what's in these holds or anything—altogether what's down there, so we have to control it as fast as we can, to hold it back. We could see this other pile of paper over there once in a while, whenever smoke would blow back. You knew there was more there.

Q. I see. Now, in your experience in fighting fires—combating fires—have you not found that earliest application of fire fighting methods to a fire is normally the most effective? A. Oh, yes.

Q. Such as minimizing damage?

A. Yes, you can put a fire out with a bucket, usually, if you can get to them to start with.

Q. So, in other words, in this particular case, had water been able to be applied even earlier than your arrival, you feel that the extent of the fire would have been lessened considerably?

A. Yes. I don't know how the fire started, but it couldn't have started very big—you could put it out with pretty near anything. Surely a small hose line would have put it out when it started. That wasn't of a nature that it just started spon-

Respondent's Exhibit No. 23—(Continued)
(Testimony of Kenneth W. Post.)
taneously all over. We consider that a delayed alarm in our department.

Q. A delayed alarm?

A. Yes; we didn't get a call right away on it—the minute the [311] fire started—we didn't get a call on it.

Q. I wonder if you could maybe clarify that a little. I'm not sure—— (interrupted).

A. Well, in this way; that there was men working—you take and assume that men was working there—and discovered the fire. If they had called the Fire Department right away, we'd have been down there in a short time, and it wouldn't have gained so much headway. Fires don't—they don't start that fast.

Q. As I understand it now, you had first water at the scene within approximately seven minutes from the time you received the alarm, which is—— (interrupted).

A. I imagine that's pretty close.

Q. That strikes me as rather fast and rapid service, also.

A. Yes, but it wasn't directed onto all the fire, you see, from the top down. It's quite a ways down into the hold of the ship, and you shoot at an angle like this (indicating) down in there. That isn't a proper application, but it's all we could do at the time. Proper application would have been down close, where you can put it directly on all the fire. We was only hitting part of the fire and holding

Respondent's Exhibit No. 23—(Continued)
(Testimony of Kenneth W. Post.)
it in check, and that's what these "Bresden" nozzles did a little later. We put them down to keep it from spreading.

Q. Now, as I understand, no one, at any time, advised you of the fact that the ship's fire main system had been inoperative. [312]

A. No, I never made inquiry into that.

Q. Have you been questioned, or given any testimony prior to this time, relative to this casualty?

A. You mean about this particular fire?

Q. Yes. A. Oh, no; no.

Q. And you state if there is, or has been any investigation made relative to the fire, that Mr. Roth would have been the gentleman who would have handled it?

A. Yes, that's right. We usually make our investigations after the fires are out.

Q. Yes. Did you receive full cooperation and assistance from the ship's force?

A. Yes, I did. Everything I asked for, they did it.

Q. I see.

A. Like removing these—first I removed this hatch cover, or whatever you call it—for the wind break—and that wasn't sufficient. Maybe it was three or four minutes—maybe five minutes—later, I asked him to remove the pontoons, and they did it right away.

Q. Were you hampered by anyone during the period you were combating the fire?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Kenneth W. Post.)

A. Not a bit.

Q. Have you, since the fire, received any report, either official or otherwise, relative to the cause of the fire? [313]

A. No—well, the Department has, I imagine. The Fire Marshal's Office keeps a record of these, and you could get your information from that for the investigation part of it.

Q. Now, when you left the vessel, was Mr. Roth—he remained at the scene? A. Yes.

Q. And did he retain a large group of Fire Department personnel with him?

A. Oh, yes; when I sent the recall in, I sent everybody back but the first alarm assignment, so he had the first alarm assignment there, which was three engines, and I think he kept the next truck—three engines, two trucks and a fire boat was retained there. Now, how long he kept them there, I don't know.

Q. Now, Chief, understanding that this is an official government investigation inquiring into the facts surrounding this particular casualty, is there anything further that you feel might prove pertiment to this investigation, or anything you'd care to add at all that hasn't been brought out, now, by my questioning?

A. No, not that I know of, because I don't know what the investigation is about to start with. There was a fire and that's the part that you're trying to find out from me.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Kenneth W. Post.)

Q. That's right. The investigation, primarily, is to ascertain the facts surrounding the casualty in order to establish the cause, any violations that may have been involved, [314] or any negligence on the part of any persons.

A. Well, I wouldn't know; it would be just rumor what you'd hear.

Q. Well, that of course, we don't want.

A. That wouldn't count.

Q. There is nothing further, then, that you'd care to add?

A. Not that I can think of at this time.

Lt. Cmdr. Mason: Very well, I want to thank you very much for coming up here today.

(Witness excused.)

CECIL F. ROTH

was called as a witness by the United States Coast Guard, and first having been duly sworn, was examined and testified as follows:

Examined

By Lt. Cmdr. Mason

Q. Please state your full name and mailing address, sir.

A. Cecil F. Roth, 3964 Southeast Boise Street, Portland 2.

Q. Is that R-o-t-h, or R-o-t-h-e?

A. R-o-t-h.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Cecil F. Roth.)

Q. And how are you presently employed, Mr. Roth? A. By the Portland Bureau of Fire.

Q. And what is your particular designation with that bureau? A. A Battalion Chief.

Q. And how long have you been in that capacity, sir?

A. I've been in that capacity for eleven [315] months.

Q. And how long have you been active in the Portland Fire Department?

A. Just over nineteen years.

Q. And did you have any affiliation with any other fire department prior to that time?

A. Not prior to that time, no.

Q. And during your career with the fire department, what has been your experience—the extent of your experience?

A. Well, my experience within the Bureau has been somewhat general. I've served on every type of apparatus that the Portland Fire Department has, and I spent three years in the fire fighting division of the Navy, also, as an enlisted man.

Q. When was that, sir?

A. That was between 1942 and '45.

Q. Were you—did you attend any of the Navy fire fighting schools?

A. I was an instructor at Manchester.

Q. I see.

A. A temporary instructor, I might add; I was not assigned there; I was temporarily detached from

Respondent's Exhibit No. 23—(Continued)
(Testimony of Cecil F. Roth.)
Naval Air Station, Pasco, as instructor at Manchester Training School.

Q. I see. Now, during your career in combating fires, have you had any experience with respect to shipboard fires?

A. I believe this is the third shipboard fire to which I have reported. [316]

Q. Now, when you say "this," you are speaking of the Robert Luckenbach fire, which occurred on 2 April? A. Yes.

Q. I see, and the two previous fires—what type of fires were they? Were they cargo, or—— (interrupted).

A. One was at the drydock when I was a fire fighter assigned to Engine 36, and it was a fire in the hold, and the other one was a fire in the crew's quarters, I believe, in a Navy or Army transport. It was docked at the foot of Stark Street, about 1946 or '47.

Q. I see. Now, when did you receive your first knowledge that the fire was in progress on board the Robert Luckenbach?

A. Well, I was at my Battalion Quarters at Engine 24.

Q. Where is that located?

A. That is located at North Interstate and Willamette Boulevard, and we have an intercom system—or loudspeaker—that is piped into all stations from our central alarm headquarters, and they announced, in connection with the alarm box, that the

Respondent's Exhibit No. 23—(Continued)
(Testimony of Cecil F. Roth.)
fire was aboard the Robert Luckenbach at Luckenbach Terminal.

Q. And do you know what time this was?

A. I happen to remember that it was at 6:20—1820.

Q. On 2 April.

A. Well, I would have to do some recollecting.

Q. Well, that's all right, sir; the date of the fire has been [317] established as 2 April, so that's all right. And what did you do then, sir?

A. Well, I got into my car and I drove to the Luckenbach Terminal.

Q. And, I'll ask you in your own words, to simplify this, if you would just relate from that point on, what you saw and what you did.

A. All right. I was aware that Assistant Chief Post, who is my immediate superior, had also answered, because I saw him, so in fact, I believe that he got aboard ship a few seconds before myself, and there was smoke and intense heat coming out of the hold, and am I to understand that that is number four hold?

Q. Number five, sir.

A. Number five; number five hold, and the smoke and heat indicated that the fire probably was near the forward end of the hold. I conferred with Chief Post, and asked him what he wanted me to do. He told me to immediately see that a third alarm was sounded on the fire, which I did. After attending to that, I—— (interrupted).

Respondent's Exhibit No. 23—(Continued)
(Testimony of Cecil F. Roth.)

Q. How did you do this, sir?

A. Well, I contacted a man who was standing over on the pier, perhaps twenty feet from me—a man who I knew—and I told him to go to the closest fire department radio and sound a third alarm. So, after doing that, I reported back to Chief Post at the scene of the fire, and we—by that time, several companies [318] were playing hose lines in the direction of the fire as nearly as they could ascertain it. I say as near as they could ascertain, because there was dense smoke, and it was only by close observation that we could periodically see the flare of the flames. It was somewhat apparent that we weren't getting the fire sufficiently with the straight nozzle and so, also after conferring with Chief Post, we considered it advisable to lower what we call the "Bresden Distributors," which throws a coarse spray at about a thirty foot diameter—fifteen foot radius.

Q. How many hoses were in the hold at this time?

A. At the time we ordered the Bresdens?

Q. The Bresdens.

A. I would say we had two or possibly three hose lines operating in the hold at that time, although it is difficult to say with any certainty exactly, but I would say two to three.

Q. I see. Then, were the hoses equipped with standard nozzle, or did they have that deflection type?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Cecil F. Roth.)

A. Most of our nozzles are equipped with the—so that the men can select either fog or straight stream, and in this case, we had—I think all the nozzles that were there, were so equipped, and I recall having the men change to straight stream, in order to get the range, because when I was able to see, I could see the fire was at some depth and there was quite a little reach into it. [319]

Q. Forward? A. Yes.

Q. The forward part of the hold?

A. Yes, yes.

Q. All right, sir, if you will continue.

A. Well, then, after we decided to make use of the Bresdens, as the companies reported, I would ask them if they had Bresdens as part of their equipment. Some of our companies are equipped and some are not—with Bresdens—and since we were getting companies in from some distance—companies with which I was not too familiar, I was asking whether or not they carried the Bresden, and if they did, I'd tell them to bring it up and put it in operation, and in some cases—at one time we had at least one extra Bresden there, and I directed the company to lay in a line and attach that Bresden and to operate it. Of course, we observed the progress, and I cautioned the officers to observe as closely as they could, to make every attempt to get these Bresdens at the proper level. Some minutes later, perhaps fifteen or twenty, I conferred

Respondent's Exhibit No. 23—(Continued)
(Testimony of Cecil F. Roth.)

with Chief Post again, and we decided that we had better lift the hatch covers, which we made arrangements to have done. This necessitated shutting off some of these lines, because those things are pretty heavy, and there was a decided hazard there—there was some excitement on the part of the ship's crew and so on, and so we practically stood back and stood clear, and during that time, [320] for a few minutes, I would say that they probably shut down a couple of lines, because the men couldn't attend them, with the things swinging over their heads. After the hatch covers were removed, we were able to use some hand lines to a bit more advantage, because of the more advantageous angle we were able to assume, and the fire began cooling shortly after the hatch covers were lifted, and at that time we considered it expedient to equip two crews with self-contained masks and put them in the hold with hand lines. That roughly outlines the fire fighting operation.

Q. I see. Now, when you first arrived at the scene, do you know whether there was anyone down in the hold at that time?

A. Well, I would have every reason to believe that there was not. I don't think it was livable in the hold at that time.

Q. You, yourself, didn't observe anyone down there? A. No; I did not; no.

Q. As I understand it, some water was also ap-

Respondent's Exhibit No. 23—(Continued)
(Testimony of Cecil F. Roth.)

plied to the after end of the hold forward of number five?

A. That is true. Somewhere early in the stages of the thing there, either Chief Post or myself—I've forgotten who. Some of these decisions were arrived at through conference, and some we arrived at independently, but at least a company was ordered down into that hold to protect what we call the "exposure," and they were in that hold at all times during the fire. In fact, they extinguished a couple of spot fires down [321] there.

Q. I see. Now you stated that you received the first information of the fire at 6:20 p.m., or 1820. Do you have any recollection of what time you arrived at the scene?

A. I could only estimate that it would probably take me three minutes to drive it—three or four minutes.

Q. There was no water being applied upon your first arrival, was there?

A. Not to my knowledge.

Q. In either event, the fire department was not applying any water at this time?

A. Right; that's right.

Q. And approximately how long after your arrival, would you say it was, before water was applied—first water?

A. Oh, I think that water was being directed within three minutes after our arrival.

Q. When you first arrived at the scene, did you

Respondent's Exhibit No. 23—(Continued)
(Testimony of Cecil F. Roth.)
give any consideration to covering over the hatch in an effort to smother the fire? A. No.

Q. Did anyone at the scene suggest the use of the CO2 system, which we have since found the vessel to be equipped with?

A. No; no one suggested it, and I wouldn't have entertained had they suggested it.

Q. You would not. Why is that, sir? [322]

A. Well, the hatch was open, and the fire was well supplied with air, and I would say that fire would have gained in intensity for quite a few minutes after it had been covered had we used CO2, and CO2 has no cooling action, and there was enough fire in evidence that cooling was definitely indicated, and I could only speculate as to how long you would have to keep that hatch closed with CO2 in the hold, before the fire would be extinguished, but I would think that perhaps—well, I'd hesitate to say. I would be convinced that we would have fire in there after twenty-four hours.

Q. But, in either event, based on your own experience, you feel that the use of CO2 at that particular stage of the fire would have proved futile?

A. Right.

Q. Now, can you estimate for me how long after first water was applied that the fire was extinguished?

A. Well, I think a matter of record is that we sounded the recall at 7:47, I believe. Now, we don't usually sound the recall at the first moment we

Respondent's Exhibit No. 23—(Continued)
(Testimony of Cecil F. Roth.)
think the fire is out. I would say, as a practical matter, that the fire probably was considered under control fifteen or twenty minutes prior to that time.

Q. And, as I understand it, from your superior, Mr. Post, shortly thereafter, or about that time, he left the scene?

A. Yes; he left shortly after we returned the greater alarm [323] companies.

Q. I see, and you remained on board?

A. Yes.

Q. And, basically, was this for the purpose of shifting or removing cargo, to ascertain that there was no further fire?

A. Digging out the fire, that's right.

Q. And did you proceed with this?

A. Yes; I did.

Q. About how long were you there, would you say?

A. Well, I don't have all my reports in from this fire yet, but—and I haven't taken the trouble to check and see exactly what time I returned to quarters. That is a matter of record with the department, however, and would be easy to ascertain.

Q. I wonder if you could estimate for me approximately what time you left?

A. I think—let's see—I would say about a quarter to four.

Q. In the morning?

A. Three-forty-five, yes.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Cecil F. Roth.)

Q. That's, I fully realize, an estimate of the time? A. Yes.

Q. By this time, you had removed a portion of the cargo, had you, from the hold?

A. Yes, sir.

Q. And where did you stow this cargo that you removed?

A. It was placed on a steel barge that was brought up alongside [324] the vessel.

Q. Was this a fire department barge?

A. No, sir; it was not.

Q. Do you know how the arrangements were made for the barge to appear there?

A. I only know that I asked one of the Mates to make the arrangements for removal of the cargo, and that arrangement was made.

Q. I see. Was it your men, or was it ship's force, or longshoremen, do you know, that actually removed the cargo from the hold?

A. The fire department removed the cargo and placed into the baskets, and the longshoremen handled it from there.

Q. I see. Was this done with the winches?

A. Yes.

Q. Do you feel that you received full co-operation from all of the ship's force during all of your operations down there?

A. Very fine, I would say.

Q. Were you hampered by anyone at all?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Cecil F. Roth.)

A. No; not at all.

Q. And did you, personally, go down into the hold and examine the area yourself?

A. I did, before we secured, yes, sir.

Q. I see. Were there any particular findings that you observed down there? [325]

A. Well, the only observation that I made was that due to an opening in a—well, a partial division in the center of the ship—there was an opening there that allowed the fire to extend to both sides of this division, whereas I felt perhaps if it hadn't been for this opening, we would have only had fire in one corner of the hold. I don't recall any other finding that I considered significant.

Q. I see. Now, did you observe the cargo that was removed from the hold? A. Yes.

Q. And what was the nature of that cargo?

A. I would call it art paper in packages, along with several bales of burlap.

Q. Were they burlap bags, do you know?

A. I think they were. We removed them in bales however, but I think they were bags.

Q. Did you receive any information or report upon your initial arrival or at any time, which would indicate to you approximately how long the fire had been in progress before you were able to bring water to the scene?

A. I don't recall receiving any such information.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Cecil F. Roth.)

Q. Now, as I understand it from Chief Post, if the fire department were to conduct an investigation relative to this fire, that you would be the one to handle such investigation? A. Myself? [326]

Q. Yes.

A. Well, as the first Chief Officer assigned, I would perhaps have a part to play, but our Fire Marshal's Office does contain within it an investigating force, which would probably be more actively employed in the investigation than myself. I would probably act in any way I could to assist them, but I think the findings would be theirs.

Q. Do you know whether any such investigation has been or is being conducted?

A. I don't have any knowledge of it.

Q. Who specifically would I contact in the Fire Marshal's Office relative to any such investigation?

A. Well, the Fire Marshal's name is Dale F. Gilman. He is the Fire Marshal and he would be the man to direct such investigation.

Q. Is that G-i-l-l-m-a-n? A. One "l," sir.

Q. Did you receive any report relative to the cause of this fire? A. Yes.

Q. From whom did you receive this report?

A. I'm trying to recall, and I think it was from the—one of the Mates there was on deck.

Q. And what, specifically, did this report encompass?

A. Well, we were told the fire was caused from

Respondent's Exhibit No. 23—(Continued)
(Testimony of Cecil F. Roth.)
sparks from a [327] welding operation on the ship's ladder in the forward end of the hold.

Q. Did you examine this scene, or the ladder, yourself?

A. I only ascertained that there was a rung missing down there.

Q. You didn't observe whether or not there was any signs of welding having been performed or started at that area, did you?

A. No, I did not, because quite early in the operation, the Mate insisted that we put on a little temporary arrangement that filled in this vacant space, and I passed it down and one of the men attached it, and it more or less covered up the thing, and I didn't make any observation of the ladder itself.

Q. Have you been down to the ship since you left the first time, as you stated, three-forty-five in the morning? A. No, I have not.

Q. You have not again been down aboard. Have you been interviewed or interrogated since that time, by anyone relative to the casualty?

A. Not outside of our own department.

Q. Just your own department?

A. Yes, and I wouldn't say that took the form of interrogation; it was a discussion entered into as more of a—oh, an informal discussion of the fire as one working man to another, [328] you might say.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Cecil F. Roth.)

Q. I see. Are you familiar with any ordinances that might have been violated?

A. No, sir, I am not.

Q. Have you been required to submit a written report with respect to the fire?

A. My written report should be in the hands of the Fire Marshal now, however, due to the other chores I've had, I don't have it in yet.

Q. I see. Does this written report contain anything pertinent that would be pertinent to this investigation being made by the government, that has not already been brought out by my questioning?

A. Oh, my report would give my impression of the fire when I got there; the disposition of the responding crews; the number of lines that operated on the fire; the number of men that responded—in this case, I wouldn't feel qualified to estimate the loss, so that I would leave blank in this particular instance. That about sums up the information that would be on my written report to the Fire Marshal.

Q. I see. And I believe you stated earlier, that you do not know whether or not the department is conducting or has conducted an investigation in the cause or facts surrounding the fire?

A. Well, I have reason to believe that there was a [329] preliminary investigation at the scene. There was a Fire Marshal's man there, and I later read comments in the newspaper that were made by a member of the Fire Marshal's Office. I have that

Respondent's Exhibit No. 23—(Continued)
(Testimony of Cecil F. Roth.)
much knowledge, but as to whether or not there is any further investigation being conducted, I have no knowledge.

Q. Do you know whether Mr. Gilman was present at the scene?

A. I don't believe he was; I didn't see him.

Q. I see. Now, I just want to clarify this a bit. Chief Post had indicated that in the event an investigation were conducted, that you would be the likely one to be assigned to such investigation. From what you have told me now, I assume that this is somewhat in error—that it wouldn't really be yourself that would perform such an investigation.

A. Well, I hesitate to be placed in a position of saying my superior is in error. I could certainly be assigned.

Q. Well, I'm not trying to embarrass you or place you in an embarrassing position. What I'm getting at, however, is that as a general rule, it is more common from Fire Marshal's office to make the personal investigation of the casualty?

A. Well, perhaps a little elaboration is in order. As a Battalion Chief, we are expected to investigate and determine cause whenever possible. This is true in structural fires and in any other type of fire we encounter, however, in anything that is somewhat complicated, or where there is a loss of life, or where damages are exceedingly heavy, or where we cannot [330] readily ascertain the cause, we are directed to call upon the Fire Marshal's Office for

Respondent's Exhibit No. 23—(Continued)
(Testimony of Cecil F. Roth.)
help, which I would certainly do in this case, were I directed to investigate this fire, and my experience would indicate that the size of the fire alone and the amount of the loss would cause that action to be automatically taken if there were an investigation—that it would not be down at my level.

Q. I see. I believe you have answered my question very well. Now, Mr. Roth, is there anything else, at all, that you would care to add to your testimony at this time, that you feel might be pertinent, that has not already been brought out?

A. No, I don't think of anything.

Q. At any time after your initial arrival, did you observe any ship's fire fighting equipment at the scene?

A. I observed a fire hose on deck. That's as much as I can remember; I don't remember seeing any fire-fighting equipment below.

Q. Do you recall seeing a can or a container in the hold, that did not appear to be part of the cargo—let me clarify this for you just a little bit—it was brought out in previous testimony that the welders who had been down in the hold did have nearby, a container of water that they felt the longshoremen had left behind. It had contained drinking water, and that they had used this to attempt to douse the fire when it first occurred, and the question now, is whether [331] or not you might have observed this container down there, and we have no idea of its description, other than it ap-

Respondent's Exhibit No. 23—(Continued)
(Testimony of Cecil F. Roth.)
peared to be a size equivalent to holding five gallons. A. I didn't see it.

Q. Upon your first arrival, did you observe the extent of the fire, to be able to determine whether it had advanced to sufficient portions?

A. Sufficient portions to what, sir?

Q. Well, to being a major fire, we'll say—at the time you arrived.

A. It was a major fire when we arrived, yes, sir.

Q. Did the fire, itself, appear such as to give the impression that it was a delayed report?

A. Well, that's always a little hard to determine. Certainly I wasn't able to make any such judgment at the time, not knowing exactly what the hold contained. Upon becoming familiar with the contents of the hold, I would certainly be of the opinion that it was not a prompt report. We did not get a prompt report of the fire.

Q. Were you able to make any estimate, yourself, as to approximately how long the fire had been in progress at the time you arrived, merely by what you observed?

A. I'd be on pretty dangerous ground, making such an estimate. I feel I've gone about as far as I honestly can, when I say that I would, in all good judgment, say that it was a delayed report. [332] Now, I would hesitate to say how long it was delayed; I feel that this cargo being somewhat compact, that it did take a few minutes to

Respondent's Exhibit No. 23—(Continued)
(Testimony of Cecil F. Roth.)

gain the headway that it did, but I wouldn't like to estimate how long it took.

Q. As I understand it, this term that we have had used by yourself and the previous witness—this term—"delayed report," must refer to some official terminology. I wonder if you could just describe the meaning of "delayed report" as used by yourself or members of the fire department.

A. Well, as used by myself, I would say it means a fire that is not reported as quickly as possible.

Q. Is it a common term used by the members of the fire department? A. Yes, I think so.

Q. It does not refer, specifically, to any time element, other than the term "delay"?

A. I think that's right.

Q. In other words, it does not define the length of "delay," but merely the fact that the report—by a delay—might have been made more expediently. A. I think that's right.

Q. Is there anything further that you'd care to add at this time?

A. I don't think of anything that I could add, Commander.

(Witness excused.)

(Short recess.) [333]

Respondent's Exhibit No. 23—(Continued)

JOHN P. BEUTGEN

was called as a witness by the United States Coast Guard, and first having been duly sworn, was examined and testified as follows:

Examined

By Lt. Cmdr. Mason:

Q. What is your full name and address, sir?

A. John P. Beutgen, 1620 Cerro Gordo, Los Angeles, California.

Q. How do you spell that last name?

A. Last name? Capital B-e-u-t-g-e-n.

Q. And how are you presently employed, Mr. Beutgen?

A. As First Assistant on the SS Robert Luckenbach.

Q. And how long have you been so employed? Approximately?

A. Approximately. With the company or in this one position?

Q. In this one position on the Robert Luckenbach as First Assistant?

A. About four months.

Q. And how long have you been employed aboard the Robert Luckenbach in all? A. Two years.

Q. And how long have you been employed by the Luckenbach firm? A. Seven years.

Q. Were you Second Assistant prior to this?

A. Right, I was Second Assistant.

Respondent's Exhibit No. 23—(Continued)
(Testimony of John P. Beutgen.)

Q. And I have before me a copy of the crew list for the last [334] voyage of the Robert Luckenbach in which it is indicated that your license number is 225 129, would that be correct, sir, to the best of your knowledge? A. Yes, that's it.

Q. How long have you been sailing in a licensed capacity, Mr. Beutgen? A. Since about 1944.

Q. And were you employed as First Assistant Engineer on board the Robert Luckenbach on 2 April, 1958, the date of the fire, is that correct?

A. That's right, sir.

Q. What specifically are your duties as First Assistant Engineer?

A. Handle supervision of the engine room over the unlicensed personnel.

Q. And you are directly accountable to who?

A. Chief Engineer.

Q. I see. And do you have a watch schedule in port? A. Myself?

Q. Yes. A. I am on day work.

Q. You are on day work, and would that be from 8 to 5?

A. 8 to 5 and at any other time I am needed.

Q. I see. And at sea, you have a regular sea watch? A. No, I am on day work at sea. [335]

Q. Day work at sea also? Were you aboard the vessel at the time of the fire on 2 April?

A. No, I wasn't.

Q. When had you left? A. About 6:15.

Q. And you returned when, sir?

Respondent's Exhibit No. 23—(Continued)
(Testimony of John P. Beutgen.)

A. About 6:40, maybe before that. I am not sure what time I came back.

Q. A period of approximately a half an hour, was it? A. Approximately, yes.

Q. And were you at the terminal or had you left the area to go up town?

A. No, I just walked up to the corner for a newspaper, was all.

Q. I see. At the time that you left at about 6:15, did you observe whether or not the longshoremen were aboard?

A. No, they had knocked off about five minutes to 6.

Q. I see. Now, when you came back aboard at about 6:40 as you stated, what did you observe?

A. Well, the fire had started; the Fire Department had arrived. That's what I came back following.

Q. There had been no unusual activity or indications of any fire or casualty at the time you left the vessel at 6:15, had there? A. None at all. [336]

Q. And what did you do when you came back and observed the Fire Department and the fire in progress?

A. Well, find out what had been done up to that point where I would have anything to do with it.

Q. Did you speak with someone?

A. Well, I didn't see any of the officers. I don't know for sure where they were. I saw some of the

Respondent's Exhibit No. 23—(Continued)
(Testimony of John P. Beutgen.)
crew and asked how bad it was and—— (interrupted).

Q. Where were you at this time? I mean, did you go back—— (interrupted).

A. Still at the gangway—just at the gangway—you can look right back there. I didn't particularly want to go back and get in the firemen's way, until I knew more what was going on.

Q. Was there a gate watchman at the gangway at this time? A. Yes.

Q. And you asked, you say, what was going on?

A. Yes, well, just for general information.

Q. I see. What did you do after that?

A. I hooked up a hose to the fire line.

Q. Now, when you speak of hooking up a hose to the fire line, what—what hose, where did you obtain the hose and to what fire line?

A. It was my water—my water hose for taking fresh water, which is separate. [337]

Q. And this was already hooked up to the terminal facilities, was it? A. Yes, it was.

Q. And you disconnected it then, did you, from its connection on board ship?

A. You mean to my filling line for the water tanks?

Q. Yes, to your filling lines. A. Yes.

Q. You disconnected it? And then where did you hook it to? A. To a standpipe right next to it.

Q. To a standpipe right next to it. And did anyone assist you in this operation? A. Wiper.

Respondent's Exhibit No. 23—(Continued)
(Testimony of John P. Beutgen.)

Q. A wiper, and what was his name?

A. I believe it was Padilla.

Q. If I hand you this crew list, would you be able to pick him out? (Document handed).

A. Yes.

Q. Approximately how long would you say it took you to make this connection?

A. Oh, I suppose, guessing—would be three minutes.

Q. About three minutes. And what was the purpose of the connection?

A. Oh, in case they wanted water on our own fire line.

Q. Did you have knowledge that there was no water prior to [338] this time on the fire line?

A. Yes.

Q. How did you know that the fire main system—ship's fire main system was not operating?

A. Well, I knew that they took a section of the fire line out for repairs and blanks put on in place.

Q. When you say "they," do you refer to the Albina—— (interrupted).

A. I am referring to the Albina Machine.

Q. When was that done?

A. I think they took it out about 3 o'clock in the afternoon.

Q. Do you know the reason that it was taken out?

A. Yes, the pipe was giving out on the bend.

Q. Who had originally discovered this faulty

Respondent's Exhibit No. 23—(Continued)
(Testimony of John P. Beutgen.)
section of the pipe? A. I did.

Q. When was that? A. Panama Canal.

Q. Approximately how long prior to arrival at Portland, if you can recall?

A. About three weeks.

Q. And as I understand it, the weakened area was drilled, tapped and plugged. Did you do this yourself, personally?

A. No, I didn't. I had my machinist do it.

Q. The machinist did it? [339] A. Yes.

Q. Did anyone supervise the machinist in the repair? A. I did.

Q. You did? A. (Affirmative nod.)

Q. And were any of the other engineers aware of this particular failing? A. Oh, yes.

Q. Who? A. All of them.

Q. All of them? Was the Chief Engineer aware of it?

A. Oh, yes. I reported that to him immediately.

Q. How about the Second? A. He knew.

Q. And did the Third Engineer know it also?

A. Yes.

Q. How about the Junior Third?

A. He knew.

Q. Now, do you know whether any plans were made—— (interrupted).

Mr. Wood: Commander, could I interrupt now instead of later on and suggest something? I don't think it is clear, at least, it isn't to me, whether he means all the engineers knew of this leak being

Respondent's Exhibit No. 23—(Continued)
(Testimony of John P. Beutgen.)
plugged or whether he means they all knew that this section had been taken out. [340]

Lt. Cmdr. Mason: Oh, no, I was referring specifically to the leak being plugged.

A. That is what I assumed that you were referring to.

Q. Yes, that's right. And your answers were directed with that in mind, is that right?

A. Yes.

Q. And do you know whether any arrangements were made to replace this portion of the fire main system? A. I learned of it that morning.

Q. That morning? How did you learn it?

A. Well, the Chief Engineer, Mr. Sterling, the Port Engineer, we were going down the engine room. The Chief was showing him the line. I stopped on my way down and got in on the discussion.

Q. And what did this discussion involve?

A. Well, it was mainly how much of the line to replace, whether to take out a whole section of it or break it and weld in a smaller section.

Q. I see. Was there any indication made at that time as to when the line was to be removed?

A. No; not immediately as far as I knew—some time that day was all.

Q. It was some time that day it was to be removed? A. But no time was given.

Q. No, but you understood that it would be removed that day? A. Yes, some time. [341]

Respondent's Exhibit No. 23—(Continued)
(Testimony of John P. Beutgen.)

Q. Was any indication made as to when they would be able to expect a replacement?

A. None that I recall.

Q. Now, was this information passed on to anyone else in the engineering department? Were any of the other engineers made aware of it?

A. The Second knew about it. I thought I told another, but evidently I didn't.

Q. The Second Engineer, you say, knew about it? How do you happen to know this?

A. Because he showed them—when they came to take the line out, he showed them what section was to come out.

Q. Do you know whether the Third or Junior Third were made aware of it?

A. I can't be sure.

Q. Now, after overhearing the discussion pertaining to the removal of the line and its replacement, was any discussion made that you know of or did you discuss the advisability of rigging up any alternate means for insuring water to the hydrants on board?

A. Well, when the line was blanked, I knew what we were—what arrangements were being made so we could put water on—that's why we blanked it.

Q. How did you know that these arrangements were being made? I mean, did someone discuss it with you or did you overhear a [342] discussion to that effect, or what?

A. Well, I heard when they were talking about

Respondent's Exhibit No. 23—(Continued)
(Testimony of John P. Beutgen.)

to put the blanks on that we could get water so we could put water anywheres on the ship, if necessary.

Q. Who was this that was saying that?

A. The Chief was talking to Mr. Sterling. He wanted the lines blanked so he could put water anywheres on the ship.

Q. I see. Well, now, you of course are familiar with the fire main system, are you not?

A. Yes.

Q. With this line removed and the blanks installed, was it still possible to obtain water at all the hydrants throughout the ship?

A. If I made the connection, yes.

Q. If you made what connections?

A. Well, one right there on the dock.

Q. Oh, I see, in other words, if you made the connection from the hydrant ashore to the—to the ship. But at the time that you left to go ashore, you stated that—or did you state—was this hooked up at this time? A. Not to the fire system, no.

Q. It was hooked up then to the water tanks?

A. Palatable water.

Q. Palatable water, I see. Now, did the Chief Engineer issue you any orders relative to the hooking up of this line? [343]

A. Not directly issued an order. He knew when we got the blanks we would get it hooked up.

Q. In other words, he took it for granted that you would hook up this line after the blanks were installed? A. Yes.

Respondent's Exhibit No. 23—(Continued)
(Testimony of John P. Beutgen.)

Q. I see. Did they bring the blanks aboard then and install them? A. Yes.

Q. When was that done?

A. Well, that's why I used 3 o'clock that they took the line out, because afterwards, I checked to be sure that the blanks were put on.

Q. Oh, I see. They took it out about 3 and then you checked and found that those blanks were (interrupted)——

A. Well, the workmen were still there.

Q. And then did you go ahead and hook up the fire main system? A. No.

Q. Why not?

A. Well, I knew I was going to be right there, just outside of a few minutes. I was trying to get some water on before sailing and I thought that I would be through before 6 o'clock but wasn't.

Q. But this was about three, was it not?

A. Yes. [344]

Q. And you figured you would be through filling the tanks by 6?

A. Yes. I was going to be there all night anyway.

Q. I see; well, that would be a difference of about three hours involved though. Didn't you feel it rather important to have the fire main system operating or in operative condition during those three hours? A. Yes.

Q. But you took no action to do anything about it, apparently, is that right? A. No.

Respondent's Exhibit No. 23—(Continued)
(Testimony of John P. Beutgen.)

Q. Now, let me ask you: Were there any other hydrants on the dock that you are familiar with that you might have hooked up another hose, or (interrupted)——

A. None that I know of.

Q. How about a "Y" connection, could that have been used so as to have water pressure maintained in the hydrants at the same time?

A. Well, it could have been, I think.

Q. Did you have these couplings available on board?

A. No, I would have to have made them.

Q. You would have to have made them?

A. Yes.

Q. Now, is there some other engineer that is on day work with you? [345]

A. Second is on—stands the watch—from 8 to 4.

Q. I see. He goes off at 4 o'clock in the afternoon? A. In the afternoon.

Q. When he went off, did he make any report to you, in connection with any of the engineering appurtenances, relative to operation, or auxiliaries, or anything at all?

A. I don't remember if he did or not.

Q. Now, he would have been relieved by whom?

A. The Junior Third.

Q. The Junior Third? Were you present when that relief was made?

A. I may not have been right in the engine room at the time, no.

Respondent's Exhibit No. 23—(Continued)
(Testimony of John P. Beutgen.)

Q. Where does the engineer on watch stand his watch in port? Is he required to actually be in the engine room at all times?

A. No, not at all times. We require what we call floor plate watch, but that's just our own set-up.

Q. By that you mean (interrupted)——

A. I want an engineer down there at all times.

Q. Not necessarily one of the officers, but it could be a certificated man, is that what you mean?

A. No, I want one of my engineers on the (interrupted)——

Q. Oh, I see. You do require that, that there shall be a licensed officer down below at all times?

A. Yes. [346]

Q. And then if the Second is not down there, what (interrupted)——

A. I relieve him.

Q. You would relieve him. I understand. Now, as I understand it, the replacement line for the fire main was installed at some later time. Were you familiar with the installation of that line?

A. When that was put back in?

Q. Yes. A. Yes.

Q. When was that done? A. Next day.

Q. In the morning, do you know?

A. Yes, I believe I put the final test on it at around 11:30.

Q. I see. Now, the installation was actually done by Albina, was it? A. Yes.

Respondent's Exhibit No. 23—(Continued)
(Testimony of John P. Beutgen.)

Q. Were any of the other engineers present at the time?

A. The Chief was. Now, I don't know where the Second was. He was doing boiler work.

Q. I see. Were any of the other engineers present during the removal of this line? A. No.

Q. Were you there at the time?

A. Not at the time they took the line out. I was doing some [347] other work.

Q. In the engine room?

A. No, I was out of the engine room.

Q. Could I assume then that the Second Engineer must have been in the engine room?

A. Well, he was there, but he wasn't up when they were taking—he told them what section of line came out and went back down on his own job.

Q. Right, but he must have been in the engine room (interrupted)——

A. Oh, he was in the engine room.

Q. So he was then aware of the fact that the line was being removed?

A. He should have been aware of it, yes.

Q. And I believe you stated that he was aware that it was going to be replaced? A. Yes.

Q. And you stated that after it was replaced, that you actually made a test of the line?

A. (Affirmative nod.)

Q. Did the test prove satisfactory?

A. Yes.

Q. Do you know of your own knowledge whether

Respondent's Exhibit No. 23—(Continued)
(Testimony of John P. Beutgen.)
Mr. Elixson, the Junior Third, was entirely ignorant of the removal of this fire main line and the blanking off? [348]

A. To my knowledge, I am not sure.

Q. You don't recall at any time having discussed the particular item with him, do you? A. No.

Q. Would it have been an item of sufficient importance that you would expect your watch engineers to pass it on to each when relieved?

A. Yes, I would.

Q. Now, when you went off duty at 5 o'clock, did you issue any instructions to any of the other engineers? A. No.

Q. Did you issue any instructions to any of the certificated personnel?

A. I don't believe I had seen any of them.

Q. Is the fire main system used for washing down topside, as a general rule, on board?

A. What do you mean, the mate?

Q. Yes, does he use the fire main system? Do they call for water on the fire main system for washing down? A. Yes.

Q. Do you know whether the system was used for that purpose on the day of the fire?

A. No, I don't.

Q. Do you know when the fire main system was last used prior to the fire? [349]

A. I know we used it the day before.

Q. It was functioning satisfactorily at that time, except for the fact that you did have a fire main

Respondent's Exhibit No. 23—(Continued)
(Testimony of John P. Beutgen.)

section with a—— (interrupted). A. Leak.

Q. ——repaired area? A. Repaired area.

Q. Now, do you know of your own knowledge whether the inoperative status of the fire main system was reported to anyone else outside of the engineering department, such as the Master or Chief Mate or anyone else at all? A. I don't know.

Q. However, there was the one exception that you were present when it was reported to Mr. Sterling, is that right?

A. Oh—yes, Mr. Sterling.

Q. But you don't know whether it was reported to any other ship's member outside of the engineering department? A. No, I don't know.

Q. Have you been asked to give any testimony relative to this casualty prior to this time now?

A. No.

Q. You have not. And can I safely assume that you were not instructed by anyone to suppress any pertinent information that night—— (interrupted).

A. No. [350]

Q. ——you might be aware of? A. No.

Q. Now, when you reported back to the ship, at approximately 6:40 p.m., and observed a fire in progress and the firemen there, you stated that you then, immediately, with the assistance of a wiper named Padilla, shifted the hose from the dock facility that had been hooked up to the fresh water tank over to the connection for the fire hydrants. Now, what did you do after that?

Respondent's Exhibit No. 23—(Continued)
(Testimony of John P. Beutgen.)

A. Turned it on for one thing.

Q. You did turn it on?

A. But then they didn't want it.

Q. I see. Well, of course, the fire department was at the scene at this time. But what did you do after that? Did you stay out on deck to assist?

A. Yes.

Q. And did you assist in any other way?

A. Yes—anything we could do. The main thing was to keep out of the firemen's way.

Q. I see. Now, when you first reported back aboard at 6:40 and saw the fire conditions in progress, were you told by anyone that there was no water to the fire system, or did you immediately, knowing there was no water, go over to make this shift in the connection?

A. That's why I made the shift in the connection. [351]

Q. In other words, you made it as a result of your own knowledge that there was no fire—no water on the fire main. You didn't make it after someone reported to you that they weren't getting water?

A. That's right.

Q. Did anyone subsequently report to you that they had not gotten water, such as—— (interrupted).

A. Yes, well, it was much later when they told me about it.

Q. But not during that particular interim of time? A. No.

Respondent's Exhibit No. 23—(Continued)
(Testimony of John P. Beutgen.)

Q. Who was it that told you much later?

A. I don't—two or three people. I don't know which one would be the first one.

Q. Did the watch officer—— (interrupted).

A. He was one of them, yes.

Q. He was one of them? Did you see the Chief Engineer when he returned aboard? A. Yes.

Q. Did he contact you relative to the casualty and what had happened?

A. Well, I suppose that's why he came into my room.

Q. And did you tell him at this time that the fire hydrants had not been hooked up at the time—immediately prior to the fire?

A. I don't think I had to tell him. I think somebody else had [352] already informed him.

Q. I see. Do you feel that it was a safe practice to leave the vessel without the fire hydrants operating for a period that you estimated was going to be some three hours?

A. I was only gone about thirty minutes.

Q. But you stated that the—that the fire main section had been removed about 3 o'clock and you weren't going to hook up the hose to the fire hydrant until about 6, when the tanks were filled, which would be an interim of about three hours, wouldn't it be?

A. Well, I still could give them water. The fire—that didn't cut out the port side of the ship. We still had water on the port side of the main house.

Respondent's Exhibit No. 23—(Continued)
(Testimony of John P. Beutgen.)

Q. Water to how many hydrants?

A. I think there were four.

Q. Four right adjacent to the main deckhouse, is that it?

A. They are all on the main deckhouse.

Q. And that would be water fed by a riser from the engine room, is that right? A. Yes.

Q. But there would be no water to the hydrants located forward and aft in the vicinity adjacent to the cargo hatches? A. No.

Q. You felt that this was not an unsafe condition then? A. It wasn't safe, no. [353]

Q. But when you went off at approximately 6:15, you had not reported this condition to the mate or anyone else, isn't that right? A. That's right.

Q. Before Mr. Elixson went on watch, did he contact you for any instructions? A. No.

Q. And after he did go on watch relieving the Second Assistant, did the Second Assistant contact you to advise you of any unusual conditions or to discuss with you any of the events of the day?

A. I talked to him, but what we talked about, I don't know.

Q. That would be Mr. Porter, is that correct?

A. Right.

Q. Who mainly aboard the vessel is responsible for maintaining the water to the hydrants?

A. I am.

Q. But what I meant specifically was the department—it would—— (interrupted).

Respondent's Exhibit No. 23—(Continued)
(Testimony of John P. Beutgen.)

A. The engine room.

Q. Primarily the engine room department—the deck force would have no initial concern with the supplying of water to the hydrants? A. No.

Q. And with respect to filling the fresh water tanks and [354] maintaining adequate supply of palatable water, that would also be the—— (interrupted). A. Engine department.

Q. ——engine force? And the particular one in the engine force responsible for the water, that duty is delegated to you on this particular vessel, is that correct, as First Assistant?

A. Well, supervise—see that we get the water and also the fire stations and at the fire pump.

Q. I see. Now, did the Chief Engineer give you any explicit orders to hook up a hose from the shore terminal to the fire hydrant to insure that water would be available at the hydrants?

A. Not explicitly. When I was in on the discussion, talking about removing the line, make sure that there were blanks so that we could supply water.

Q. Well, I wonder if you could just clarify that a little bit. Just how did the discussion go? Explain as closely as you can recall the words of each who were present there at that discussion?

A. Well, I couldn't quote it word for word.

Q. No, I realize that, but if you can—— (interrupted).

A. I know the Chief spoke to Mr. Sterling—the

Respondent's Exhibit No. 23—(Continued)
(Testimony of John P. Beutgen.)
idea was to be sure they were blanked and then we could furnish water to any part of the ship. [355]

Q. He mentioned this to Sterling to insure that the lines were blanked off and the primary purpose of that being so that they would be able to then bring water to the hydrants?

A. That's right.

Q. But the Chief Engineer did not then specifically turn to you and make any comment to the effect of hooking up the lines, did he? A. No.

Q. Have you ever served aboard any other vessel that has suffered a fire casualty? A. No.

Q. This is—is this your first experience of a fire aboard the Robert Luckenbach? A. Yes.

Q. Now, is there anything further, Mr. Beutgen, that you would care to add or you feel might be pertinent to this investigation that has not been brought out by my questioning, or anything at all that you would care to say relative to the matter?

A. No.

Q. You stated that it took you, I believe you mentioned, three to four minutes to shift over the dock connection from filling the tanks to the hydrant—was that correct?

A. Well, as I stated, my time might be way off. It was more likely less than that. [356]

Q. Now, assuming that you had been aboard at the time that the fire broke out, how long do you estimate it would have taken you to have shifted that line?

Respondent's Exhibit No. 23—(Continued)
(Testimony of John P. Beutgen.)

A. Oh, I never timed myself doing it. Maybe two minutes. It's hard to say.

Q. Did it require the use of a spanner?

A. Yes.

Q. Was there a spanner right at the hydrant?

A. Yes.

Q. And was there also a spanner at the fresh water connections?

A. Well, they are right—they are only two feet apart.

Q. I see, the two connections—in other words, the connection to fill in the fresh water tanks and the connection to put water onto the hydrants are only a couple of feet apart and there is a spanner right there? A. Yes.

Q. You estimate that it would have taken you possibly two minutes or thereabouts?

A. Just about.

Q. Were you aware of any welding that was to be accomplished on board the vessel—any welding whatsoever? A. No.

Q. Or specifically any welding that was to be accomplished in number 5 hold?

A. I didn't know anything about it. [357]

Q. You didn't know a thing about it. When did you first become aware, if at all, that welding was going to be done or had been done aboard the vessel?

A. About 7 o'clock, I imagine, when I asked somebody how it started. They said that the welders

Respondent's Exhibit No. 23—(Continued)
(Testimony of John P. Beutgen.)
were working down there and that was the first I knew we even had welders aboard.

Q. I see. Were you familiar with any repair item to be accomplished on the vessel which involved a Uni-strut installation in the number 2 lower 'tween deck? A. No.

Q. You weren't aware of any repair item or installation item of that nature? A. No.

Q. And you are not aware of any ladder rung missing in number 5 hold? A. No.

Q. That is, prior to the fire?

A. Prior to the fire, no.

Q. Now, as a general rule, with respect to repair work to be done on board this vessel when it comes in from a trip, do you make up the particular job orders or do you just merely report your findings to the Chief Engineer and he would make it up? How does it normally work?

A. Well, I report my findings to the Chief and if it is something I can't handle and need the shore authority to do it, [358] that then he would take care of it from there on out.

Q. I see. Do you happen to know what the estimated time of departure of the Robert Luckenbach was to be from Portland?

A. Not specific time. I just knew the general day.

Q. What was the information that you had?

A. Saturday.

Q. And where bound?

Respondent's Exhibit No. 23—(Continued)
(Testimony of John P. Beutgen.)

A. To the San Francisco area.

Q. On 5 April? A. Yes.

Lt. Cmdr. Mason: I guess that's it. Thank you very much, sir.

(Witness excused.)

EUGENE C. PORTER

was called as a witness by the United States Coast Guard, and first having been duly sworn, was examined and testified as follows:

Examined

By Lt. Cmdr. Mason:

Q. Will you state your full name and address, sir?

A. Eugene C. Porter, 149-B Kelton Court—spelled with a K—K-e-l-t-o-n Court, Oakland, California.

Q. And as I understand it, Mr. Porter, you are a licensed officer in the United States Merchant Marine presently employed as a Second Assistant Engineer on board the SS Robert Luckenbach, is that correct, sir? [359] A. Yes, sir.

Q. I have before me a copy of the crew list from the last voyage which indicates thereon your license to be number 175 999, would that be correct, sir?

A. Let me verify that. I'm sorry, my Coast Guard ID does not give my license number. I cannot verify that license number.

Q. All right. Do you have your Z number?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Eugene C. Porter.)

A. Yes, sir.

Q. And what is your Z number, please?

A. Z-369973-D1.

Q. Thank you. And your license is for Second Assistant Engineer, is that correct?

A. Yes, sir.

Q. How long have you been serving in a licensed capacity in the American merchant marine?

A. Total time, approximately four to five years.

Q. And how long have you been going to sea altogether?

A. This last time, since November of '56.

Q. I mean, what is the extent of your seafaring experience, all told?

A. World War II, United States Navy during Korea and this last year.

Q. I see. And how long have you been employed by the Luckenbach firm? [360]

A. This particular time, since about the 28th of January of this year.

Q. And that has been on board the Robert Luckenbach? A. This particular trip, sir.

Q. And were you employed previously by Luckenbach? A. Yes, sir.

Q. I see. Now, as Second Assistant Engineer, what specifically are your duties on board the vessel?

A. I am a watch stander, being the 4 to 8 watch—pardon me, sir—clarification. Sea or shore?

Q. Both.

A. Take sea first: Stand the 4 to 8 watch. It is

Respondent's Exhibit No. 23—(Continued)
(Testimony of Eugene C. Porter.)

my job to take care of the oilers, feed water, transferring of fuel, plus keeping the main plant in operation during my watch.

Q. Now, in port?

A. In port, my job is repair work on boilers, taking fuel oil and allied equipment pertaining to the fire room.

Q. And what is your in-port watch?

A. I have the watch from 8 in the morning until 1600.

Q. And is this watch stood at all times in the engine room? A. Yes, sir.

Q. And you were on watch from 8 a.m. to 4 p.m. on 2 April, 1958, the day of the fire on board the Robert Luckenbach? A. Yes, sir.

Q. Were you present during the removal of a section of fire [361] main? A. Yes, sir.

Q. Who actually accomplished the removal?

A. I don't know, sir.

Q. Well, was it ship's force or was it—— (interrupted).

A. No, sir, it was, I understand, shipyard—— (interrupted).

Q. Shipyard workers. But you were in the engine room at the time, were you? A. Yes, sir.

Q. And did you witness the actual removal?

A. No, sir.

Q. When the removal was made, do you know whether or not the lines were blanked off?

A. No, sir.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Eugene C. Porter.)

Q. Where do you normally stand your watch when in the engine room?

A. That particular day, sir, I was working on boilers in and out, both.

Q. I see. How did you happen to be aware of the fact that this section of fire main was being removed? A. I was told, sir, that evening.

Q. You mean after the removal had been accomplished?

A. Yes, sir. No—— (interrupted).

Q. Was this before or after the fire?

A. This was after the fire. [362]

Q. I see. You were not aware of its removal prior to the fire? A. No, sir.

Q. Were you aware that the line was scheduled to be removed?

A. No, sir, I am not cut in on anything that happens as far as specifications for work to be done in the engine room.

Q. I see. And neither the Chief Engineer nor the First Assistant had advised you of the fact that this removal was to be accomplished prior to your going off watch at 4 p.m.? A. No, sir.

Q. And you did observe other than ship's force in the engine room accomplishing a removal though, while you were on watch, is that right?

A. No, sir.

Q. You did not?

A. No, sir. I can make that a little clearer, if you wish. This section of pipe that had to come out,

Respondent's Exhibit No. 23—(Continued)
(Testimony of Eugene C. Porter.)

it is up in the fidley—in fact, it is up two gratings—or one grating where I ordinarily stand my watch. There is very little reason for any of the ship's officers or the engineers to go up there. So, for that reason, and I, working on the floor plates and in the boiler and on top of the boiler, did not witness any part of that.

Q. I see.

A. So that is the reason—it was up in one grating and [363] how much was to come out or what was to come out, I have absolutely no idea because as I say, I was not cut in on any of the specifications or work to be done.

Q. Were you aware of the fact that that particular portion of line to be renewed did have a plug in it as the result of an earlier leak?

A. Yes, sir.

Q. You were aware of that? A. Yes, sir.

Q. Did you assist in the installation of that plug?

A. That happened at sea, sir, and it was being done while I was off watch.

Q. I see, but you do know that such a repair was accomplished? A. By the plug?

Q. Yes, sir. A. Yes, sir.

Q. And the First Assistant or Chief never discussed with you or mentioned the fact that that line would be renewed when the vessel reached port?

A. No, sir.

Q. Now, you went off watch at 4 o'clock—did

Respondent's Exhibit No. 23—(Continued)
(Testimony of Eugene C. Porter.)
you issue any instructions or pass on any word at all to your relief?

A. The usual items as I knew them.

Q. And what did this include?

A. That we weren't going to fire off the boiler that I had [364] been working on; leave the pressure off of it; in fact, you couldn't put pressure on it because there was no water in the boiler. I had dumped it—let him know about that.

Q. What boiler was that?

A. That was the starboard boiler.

Q. Starboard boiler? You were steaming on the port boiler?

A. On the port boiler—it was donkey—and the rest of the plant was normal. He always makes the round before he relieves me and he found everything in good order and it was just the boiler that I believe that I cut him in on.

Q. Were you filling any tanks at the time, or do you know?

A. Yes, sir—filling tanks—water? Fresh water?

Q. Yes.

A. The double bottoms had been filled on my watch and water was going to the forepeak. He was also informed of that.

Q. I see. Who was supervising this—yourself? I mean, in other words, was the watch engineer the one to supervise the filling of the tanks, or was this normally accomplished by the First Assistant on day work?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Eugene C. Porter.)

A. The First Assistant generally—I am going into generalities here. He generally takes care of it with the help of the oiler on watch. The standpipes for the overflow come into the engine room out of those double bottom tanks. The oiler is generally standing around doing not too much of anything, so he generally watches those tanks. [365]

Q. I see.

A. Then, when they are filled, the oiler generally knows where the valves are. If he doesn't, he can either come to me or the First Assistant and we will open the valves going to either the after peak or the fore peak.

Q. I see. Now, I would like to have this clarified for me a bit. You are familiar with the fire main system and the fire pumps aboard, are you?

A. Yes, sir.

Q. When you start up the fire pump—I understand it to be a centrifugal pump?

A. Yes, sir.

Q. There is a gauge there which will indicate the pressure on the line, even though there is no water being discharged out of any of the hydrants, would that be correct? A. Yes, sir.

Q. And the removal which you subsequently know about now—the removal of this portion of the line—of the fire main, where they blanked off the area, that wouldn't have changed what I have just mentioned, would it? In other words, the indicator dial would still show a pressure if the fire pump

Respondent's Exhibit No. 23—(Continued)
(Testimony of Eugene C. Porter.)

was operating? A. Yes, sir.

Q. Now, when the fire pump is operating with a pressure and the line is in proper order and then when one of the hydrants is [366] turned on, does that pressure indicator tend to drop?

A. Yes, sir.

Q. It will drop? A. Yes, sir.

Q. In other words, would that be an immediate method of knowing when water is actually being discharged on deck then?

A. Yes, sir. Conversely, it works the same way, when valves are shut off, our pressure goes up.

Q. Would rise? A. Would rise.

Q. Is it an appreciable difference for say, the use of one hydrant, such that you would readily notice it on the indicator dial?

A. You would have—if I remember this dial correctly, you would have to be looking for it.

Q. I see.

A. As an example, water on deck to wash off the anchor chain.

Q. Now, if you were on watch in the engine room at the time that a fire alarm was sounded, would it be your duty then as watch engineer to immediately start up the fire pump or would you wait until you were actually given orders to put water on deck?

A. It is the procedure on most merchant ships, sir, when you get the fire alarm, to wait until you are ordered to put water on deck. [367]

Q. I see. All right, now, when receiving such an

Respondent's Exhibit No. 23—(Continued)
(Testimony of Eugene C. Porter.)

order to put water on deck, is it then your duty as watch engineer to see that that pump is started?

A. Yes, sir, it is my duty to see that it is started.

Q. Then when it is started, would you then observe the indicator dial to see if the pressure had been brought up?

A. It is second nature, sir.

Q. It is. And have you had occasion to be on watch in the engine room during any fire drill at any previous time on board the Robert Luckenbach?

A. Yes, sir.

Q. And have you had occasion then to start the pump when water has been requested on deck?

A. Yes, sir.

Q. And it has been second nature to notice the dial? A. Yes, sir.

Q. And do you then continue to watch the dial, to see if there is any drop—that is, whether they actually opened the hydrants to take water on deck?

A. No, sir. When I say "no, sir," not to continue to watch it. Watch it and make sure that there is pressure there and when we are satisfied in our own mind that the water is going through, then it possibly could be that something else would come up and your attention may be directed to something else. You are not just watching one thing. You have many things to watch. [368]

Q. Well, what I am trying to get at, Mr. Porter, specifically, is that if you were to be requested to put water on deck and you, as you have stated, you

Respondent's Exhibit No. 23—(Continued)
(Testimony of Eugene C. Porter.)
started the pump and then noted the pressure coming up on the dial, would that alone be sufficient to your way of thinking to assume that there is now water on deck, merely because the pump is operating and the dial reads the pressure?

A. Sir, you have another dial, too, that is rather important, and that is the suction valve. And you want to make sure that you are getting suction as well as getting a discharge.

Q. I see. But it wouldn't necessarily behoove you then to continue to watch the pressure gauge to insure that there isn't a drop, indicating that they had opened the hydrant and actually gotten water, would there?

A. Sir, the best I can answer that, as I say, you do watch it, but you don't stand right there and glue your eyes to it. Supposing they opened up, say, five hydrants, you are going to get quite an appreciable drop in pressure. But if only one is opened, why, it won't make too much difference, but if they opened five or ten, yes, then you have to speed up your pump.

Q. I see. It wouldn't be—there wouldn't be any need to alter the speed of the pump with the use of say, one or two hydrants, would there?

A. Not on this particular pump, sir. [369]

Q. What is the pressure—a matter of standard pressure?

A. One hundred pounds, maybe one hundred and twenty.

Respondent's Exhibit No. 23—(Continued)
(Testimony of Eugene C. Porter.)

Q. That's on the indicator?

A. On the indicator—one hundred to one hundred and twenty pounds.

Q. Now, after you went off watch at 4 o'clock, did you remain aboard or did you go ashore?

A. No, sir, I went ashore.

Q. About what time did you leave?

A. As soon as I could get off. I don't recall the exact time, sir.

Q. And when did you return aboard the vessel?

A. The next morning.

Q. About what time? A. About 7:20.

Q. Now, after you came back aboard, did the Chief Engineer call you in to discuss the fire casualty with you? A. No, sir.

Q. Did anyone call you to discuss the fire casualty or the failure of the system—water system—fire main system to have provided water?

A. No, sir.

Q. Were you familiar with any welding repairs to be accomplished aboard the vessel on its visit to Portland at this time? A. No, sir. [370]

Q. Now, I would like to get a little bit better description, if you can render it for me, of the fire main system on the ship. As I understand it, the removal of this section of the fire main that you have since understood was removed—water could not be supplied to certain portions of the deck hydrants. Now, first of all, do you know off-hand how many risers there are in the system?

Respondent's Exhibit No. 23—(Continued)
(Testimony of Eugene C. Porter.)

A. No, sir, I don't.

Q. Are you familiar with the fact that the removal of that section of line did prevent water from reaching certain hydrants on deck?

A. Now, rephrase that, sir?

Q. In other words, think over for a moment, the system as you know it—the fire main system as you know it, and see if you can describe what hydrants would—have failed to receive water on deck with the removal and blanking off of that section that was later done?

A. Well, actually removing that section did shut water off to all parts of the ship, the way I understand the system.

Q. Well, there is a—mind you, I am not trying to catch you on this. If you don't know, it is perfectly all right, but I am just trying to clarify this thing in my own mind. We already understand that there is one riser, evidently emanating from the engine room space, which was not affected by the removal of this particular portion of line. Are you familiar [371] with that one?

A. Oh, oh, no, sir, I am not familiar with that.

Q. I see. Because the main thing I am trying to determine is, how many hydrants off of that one riser were still operative?

A. No, sir, I am not familiar with that.

Q. I see. Now, is there anything further that you would care to add at this time or feel might be pertinent to this investigation? A. No, sir.

Respondent's Exhibit No. 23—(Continued)

Lt. Cmdr. Mason: Very well, that's all. Thank you very much, sir.

(Witness excused.)

Lt. Cmdr. Mason: Now, we have one more item for the record here. Will you mark this exhibit number 8?

(A document was marked Coast Guard Exhibit 8.)

Lt. Cmdr. Mason: For the present, at least, the interrogation of further witnesses is not contemplated by the Coast Guard. However, for all of you people present who desire to be present in the event further witnesses—it should be found necessary to recall or to call new additional witnesses at some later time, I will ask that you leave your name and your telephone number where you may be reached with our stenographer before you leave today. Now, before concluding this portion of the investigation, [372] I will introduce into the record, Exhibit number 8, which I shall identify as a photocopy made this date at this office of the pertinent page, including Section 16-2527 of the Police Code—incidentally, gentlemen, I have copies for you here—the Police Code of the City of Portland, Oregon.

And with that, let us adjourn.

(Whereupon, at 11:42 o'clock a.m., April 8, 1958, the preliminary investigation into the above-entitled matter was adjourned.)

Received in evidence January 6, 1960. [373]

Mr. Wood: Your Honor, Exhibit 21 is the bills of lading, and we rely on them because they incorporate the fire statute. However, Mr. Gearin has already offered all the bills of lading. You have offered all that cover your cargo, have you not?

Mr. Gearin: Yes, sir.

Mr. Wood: So I don't really see any use in duplicating [15] them.

The Court: Let's not have a duplication.

Mr. Wood: He offered them only for one purpose—I forget what the purpose was—but I want to use that exhibit for my own purpose, namely, incorporating the fire statute in the bill of lading.

Mr. Gearin: That is all right with us, if our exhibits are used for that purpose, your Honor.

The Court: Yes. Any objection, Mr. Krause?

Mr. Krause: I haven't any, no.

Mr. Wood: So I will not duplicate them.

I offer Exhibit 24, which is a diagram of the No. 5 hold.

Mr. Gearin: No objection.

Mr. Krause: We have none.

The Court: Admitted.

(The diagram of No. 5 hold above referred to was received in evidence as Respondent Luckenbach's Exhibit 24.)

Mr. Wood: I offer Exhibits 25-A and 25-B, which are, respectively, two photographs of the No. 5 hold. They were not taken, however, at that time. They were taken at a later time.

Mr. Gearin: No objection.

Mr. Wood: They are merely illustrative of the situation.

Mr. Krause: I want it understood that the lumber on the [16] floor there, and so on, does not represent the condition at the time.

Mr. Wood: They do not represent the condition at the time. They just show the dimensions of the hold, and so forth, and the shape of it.

Mr. Krause: Yes. That is all right. For that purpose we have no objection.

The Court: They will be admitted with that understanding.

(The photographs above referred to were received in evidence as Respondent Luckenbach's Exhibits 25-A and 25-B, respectively.)

Mr. Wood: We have no further evidence at this time, your Honor. Whether we shall call any witnesses or not, of course, depends on what is offered. We may have some rebuttal. At this time we have no further evidence.

Mr. Krause: Mr. Gearin's Exhibit No. 2, your Honor, I am objecting to on the ground that it is all hearsay. It is a report of the fire marshal as to what was reported to him. The very same people that he interviewed testified under oath before the Coast Guard, and his conclusions as to what caused the fire, and so on, I think are improper. We object to that.

Mr. Gearin: My position on that, your Honor, is that there is testimony in the Coast Guard hearing of the qualifications of the men who attended the

fire. Your Honor, the testimony is [17] that the firemen arrived and had water in the hold within seven minutes of the time that the call was placed by Mr. Radovich. There is testimony in the record that normally in fire tests the men can get water in the hoses within one minute aboard the ship. Now there is testimony and references in the record to the qualifications of these men who made the investigation and report on behalf of the fire department. I think most of them had around 20 years' experience, and one had had three years' experience as a naval instructor in the Manchester Fire School, teaching fire-fighting aboard naval vessels. I think, your Honor, that their opinions as to the actual cause of this fire will be of aid to the Court. There is no question that these men are eminently qualified. Whether or not your Honor feels that expert testimony is desirable on this point—we know that the men arrived there within seven minutes, or they arrived within four minutes and it took them three minutes to put water in the hose. Whether or not that would be of benefit to the Court in determining this matter——

The Court: As to what caused the fire, you mean, Mr. Gearin?

Mr. Gearin: Yes.

The Court: Actually, if I understand the statement correctly here from Mr. Krause, there is no issue here as to what actually caused the fire, as to the origin of it or why it started. In view of that, Mr. Gearin, on what theory would it [18] be admissible?

Mr. Gearin: Your Honor, I know that as an aid to the trier of the facts we sometimes have to rely upon the testimony of others who know about these things.

The Court: I agree with you on that. But certainly that is not the way you normally approach it, where the conclusion is in writing by the particular person and the other side does not have an opportunity to cross-examine as to the particular conclusion or opinion that he may arrive at.

Mr. Gearin: For example, your Honor, it is customary and it is universal, I know, in this District, both in the State and Federal Courts, that in the hospital records you have the opinion of the doctor there, with the doctor never even called, and that goes to the jury as to the opinion of the doctor that there is bronchial trouble or his back was broken, or something.

The Court: Our Oregon Supreme Court reversed a case in the last year for admitting that very thing in evidence, Mr. Gearin.

Mr. Gearin: I am not familiar with that decision, your Honor. I thought I followed all of them quite carefully. But that is the purpose, your Honor. I have purposely avoided reciting what the opinion was.

The Court: I will reject the offer, Mr. Gearin. I don't think it is admissible.

Mr. Krause: Your Honor, you have ruled, but may we have [19] our objection also? I should have noted it.

The Court: I have rejected it.

Mr. Gearin: May I ask that the offer be considered?

The Court: Oh, yes.

Mr. Gearin: Thank you, sir.

The Court: Mr. Krause, do you have any exhibits?

Mr. Krause: Mr. Johansen will offer our exhibits, your Honor.

Mr. Johansen: Our No. 41 is an extract from parts of Title 46, Code of Federal Regulations, Part 95, merely the subpart headings, and a quotation from that section. Our purpose in offering this is in support of our objection to the city ordinance as showing partially the extent of the federal regulations in this field. We offer it for that purpose. We also have authorities, statutory and judicial, which we will have a brief on very shortly.

The Court: Mr. Gearin?

Mr. Gearin: I have no objection to the Code of Federal Regulations, your Honor. The Court has to take judicial notice of them, in any event.

The Court: Admitted.

(The copy of 46 C.F.R., Part 95, above referred to, was received in evidence as Respondent Albina's Exhibit 41.)

Mr. Johansen: Our Exhibit 42 is likewise taken from the [20] Code of Federal Regulations. Since Mr. Gearin introduced exhibits setting forth the Code of Federal Regulations, I felt it appropriate to do likewise. Exhibit No. 42 relates to the applicability of the classification of burlap, and other

items here involved, as hazardous articles. This regulation we are offering here is Section 146.27-1, defining a hazardous article, and setting forth the persons upon whom such definition is binding. It is our position this shows that the definition of burlap as a hazardous article is not binding on Albina, and we are offering it for that purpose.

The Court: Admitted.

(Copy of Section 146.27-1 of the Code of Federal Regulations, above referred to, was received in evidence as Respondent Albina's Exhibit 42.)

Mr. Johansen: Our Exhibit No. 43 is an abstract from 46 Code of Federal Regulations, Section 146.02-2 to 146.02-5. This is offered for the same purpose, to show that the Coast Guard regulations introduced by Mr. Gearin, I believe as Exhibit No. 3, prohibiting welding in holds under certain circumstances, likewise have no application to Albina.

The Court: Admitted.

(Copy of 46 C.F.R., Section 146.02-2, etc., above referred to, was received in evidence as Respondent Albina's Exhibit 43.) [21]

Mr. Johansen: Our Exhibit No. 44 is a signed copy of a Survey Report on the damage to the vessel. At this time I understand we are not going into the question of damages in dollars and cents. However, we offer this merely to show the extent and nature of the physical damage.

Mr. Gearin: No objection.

The Court: Admitted.

(The Survey Report above referred to was received in evidence as Respondent Albina's Exhibit 44.)

RESPONDENT'S EXHIBIT No. 44

United States Salvage Association, Inc.
99 John Street,
New York 38, N. Y.

Portland, Oregon,
April 11, 1958.

Case No. 80-3278.

Fire in No. 5 Hold
at Portland, Oregon,
April 2, 1958.

Albina Engine & Machine Wks.—Rep. Lia.
(S. S. "Robert Luckenbach")

Conditions

All services of this Association are offered and this and all other reports and certificates are issued on the following conditions:

(1) While the officers and the Board of Directors of United States Salvage Association, Inc., have used their best endeavors to select competent surveyors, employees, representatives, and agents and to insure that the functions of the Association

Respondent's Exhibit No. 44—(Continued)

are properly executed, neither the Association nor its officers, directors, surveyors, employees, representatives or agents are under any circumstances whatever to be held responsible for any error of judgment, default or negligence of the Association's surveyors, employees, representatives or agents nor shall the Association or its officers or directors under any circumstances whatever be held responsible for any omission, misrepresentation or misstatement in any report or certificate.

(2) That under no circumstances shall this report or certificate be used in connection with the issuance, purchase, sale or pledge of any security or securities, or in connection with the purchase, sale, mortgage, pledge, freighting, letting, hiring or charter of any vessel, cargo or other property, and if so used this document shall be null, void and of no effect and shall not be binding on anyone.

The terms of these conditions can be varied only by specific resolution of the Board of Directors of the Association and the acceptance or use of the services of the Association or of its surveyors, employees, representatives or agents or the use of this or any other report or certificate shall be construed to be an acceptance of the foregoing conditions.

This Report Is Exclusively for the Use and Information of Underwriters

Report of Survey made by the undersigned surveyor of the United States Salvage Association,

Respondent's Exhibit No. 44—(Continued)
Inc., on April 2, 4, 6, 7, 8 and 9, 1958, at the request of Jewett, Barton, Leavy and Kern, Portland, Oregon, on the S.S. "Robert Luckenbach" 7882 Gross Tons; 245923 Official Number; Luckenbach Steamship Company, Owners and Operators, J. W. Maitland, Master, while lying afloat and on drydock at Portland, Oregon, in order to ascertain the nature and extent of damage alleged to have been sustained in consequence of fire in No. 5 Lower Hold on April 2, 1958, at 1815. Vessel partially loaded with general cargo.

Attending:

Messrs. H. W. Sterling, representing the Owners; R. S. Brewer, representing Albina Engine and Machine Works; J. R. Bailey, representing Albina Engine and Machine Works; R. H. Connell, Jr., representing American Bureau of Shipping; R. W. Siegel, representing United States Coast Guard; A. E. Hampton, representing United States Coast Guard; J. Slater, representing Pillsbury and Martignoni.

Found:

1. Shell Plating: Port side shell plates F-6 and G-7 distorted between frames 152 and 153. Shell frames Nos. 150, 151, 152 and 153 and 154 distorted from tank top in No. 5 lower hold vertically for a length of 10′. Port side shell stringer distorted from bulkhead 149 to frame 154. Continuity bracket port fwd. No. 5 lower hold distorted.

Respondent's Exhibit No. 44—(Continued)

Recommended:

1. Shell Plating: Shell plate G-7 port to be cut out and renewed from original butt at Frame 149½ to newly established butt at Frame 154½. Shell plate F-6 port to be cut out and renewed from newly established butt at frame 151½ to original butt at frame 156½. Shell frames Nos. 150, 151, 152, 153 and 154 to be renewed from bulkhead 149 to frame 155. Continuity bracket to be renewed.

Found:

2. Forward bulkhead No. 5 Lower Hold: Bulkhead plating distorted from port shell plate to starboard hatch side girder in intermittent locations and varying heights. Bulkhead stiffeners affected.

Recommended:

2. Forward bulkhead No. 5 Lower Hold. The following sections of bulkhead plating to be cropped out and renewed, forward end of No. 5 Lower hold;

(a) 1st strake below upper tween deck from port shell inboard for a length of 22′.

(b) 1st strake below upper tween deck from 42″ to port of centerline outboard for a length of 56″.

(c) 2nd strake below upper tween deck from port shell inboard for a length of 14′.

(d) 2nd strake below upper tween deck from 4″ to port of center line outboard for a length of 38″ and a width of 56″.

Respondent's Exhibit No. 44—(Continued)

(e) 2nd strake below upper tween deck from 42″ to stbd. of centerline outboard for a length of 84″.

(f) 3rd strake below upper tween deck from port sheel inboard for a length of 10′ and a width of 5′.

(g) 3rd strake below upper tween deck from 72″ to port of centerline outboard for a length of 64″ and a width of 56″.

(h) 3rd strake below upper tween deck from 42″ to stbd. of centerline outboard for a length of 84″ and a width of 36″.

(i) Bulkhead stiffeners Nos. 6, 7, 8, 9, 10, 11, to port of centerline to be cut out and renewed for a length of 14′.

Found:

3. Centerline bulkhead forward No. 5 Lower Hold. Centerline bulkhead and stiffeners distorted from bulkhead 149 to pillar at frame 155 in No. 5 lower hold. Attached reach rods and guards affected.

Recommended:

3. Centerline bulkhead No. 5 Lower Hold. Centerline bulkhead and stiffeners to be renewed from bulkhead 149 to pillar at frame 155 in No. 5 lower hold. Reach rods and guards to be removed, repaired and replaced.

Found:

4. No. 5 Tween Deck forward: No. 5 Tween deck plating and beams distorted and set down from bulkhead 149 to hatch end beam and from center-

Respondent's Exhibit No. 44—(Continued)
line outboard to port shell. Hatch end girder face plate distorted for a length of 36″. Flange of port hatch side girder distorted for a length of 30″.

Recommended:

4. No. 5 Tween Deck forward: No. 5 tween deck beams to be renewed from centerline to port hatch side girder at frames 150, 151, 152 and 153 and from port hatch side girder to port shell at frames 150, 151 and 152. Distorted flanges of girders to be faired. Deck plating to be split, faired and re-welded.

Found:

5. Electrical fixtures and circuits: Wiring and fixtures for 6 lighting circuits and one receptacle circuit burned and overheated forward end No. 5 lower hold and tween deck.

Recommended:

5. Electrical fixtures and circuits: Renew electrical wiring from panel in mast house as follows:

From panel to light fixture—No. 4 upper tween deck stbd.

From panel to light fixture—No. 4 upper tween deck port.

From panel to light fixture—No. 4 lower tween deck port.

From panel to light fixture—No. 4 lower tween deck stbd.

From panel to light fixture—No. 5 lower hold port.

Respondent's Exhibit No. 44—(Continued)

From panel to light fixture—No. 5 lower hold starboard.

From panel to receptacles in No. 4 and No. 5 LH. Repair nine fixtures with new sockets, bulbs and glass.

Found:

6. Cargo Battens: Approximately 200 lineal feet of 2 x 6 cargo battens and 400 feet of 1″ vertical side shell sheating burned and destroyed port side forward No. 5 Lower Hold.

Recommended:

6. Cargo Battens: Approximately 200′ of 2 x 6 cargo batten and 400′ of 1″ vertical sheating to be renewed.

Notes:

(a) Provide necessary drydocking to accomplish side shell repairs.

(b) All interference in way of repairs to be removed and replaced.

(c) No. 5 port deep tank to be cleaned and gas free certificate furnished.

(d) Necessary staging to be furnished, installed and removed.

(e) All repairs to be tested to satisfaction of Regulatory Bodies.

(f) No. 5 and No. 4 cargo spaces to be deodorized to remove smoke odors.

Respondent's Exhibit No. 44—(Continued)

(g) Fire debris from fwd. end of landing pad No. 5 lower hold to be cleared.

(h) All new and disturbed areas to be recoated and cargo spaces left clean and ready for cargo.

(i) No. 4 and No. 5 cargo spaces, bilges and bilge strainers to be cleared of water and fire debris.

The above listed items were prepared by the Owner's representative and work was taken in hand by Albina Engine and Machine Works on a time and material basis. After completion of repairs, the Owner's representative along with a representative of Albina Engine and Machine Works and the undersigned, examined time cards and material receipts, after which Albina Engine and Machine Works presented the following charges:

Actual Straight Time Charges on Time and Material Basis, Without Profit:

Labor—2,728 hours @ $3.01	$ 8,211.28
Labor—@ 60% overhead	4,926.77
Material and purchases	3,401.11
Port of Portland Charges, 2½ days Drydocking plus 456 long tons cargo	2,870.35
Crane—53½ hours @ $10.00	535.00
Air—33½ hours @ $5.00	167.50
Water	22.26
Electric Power	239.87
Skip Rental	4.00
Plug Box Rental	12.00
Labor to connect and disconnect power	32.10
Total	$20,422.24

Respondent's Exhibit No. 44—(Continued)

Overtime Charges:

Labor: 2,059 hours @ $3.50	$7,206.50
Port of Portland Charges:	
Docking and Undocking	928.05
Cranes 53½ hours @ $6.00	321.00
Air 8 hours @ $3.00	24.00
Labor to Connect and Disconnect	32.10
	$8,511.65

Straight time Charges	$20,422.24
Overtime Charges	8,511.65
Total	$28,933.89

Overtime Rate is double time.

This straight time charge of $20,422.24 includes $2,870.35 drydocking and a scrap credit allowance of $235.00 but exclusive of Bonus charge of $8,511.65. This straight time charge of $20,422.24 being considered fair and reasonable was approved by the undersigned without prejudice to Underwriters liability and subject to adjustment. The Bonus time charge of $8,511.65 was approved for cost only, as the overtime did not save any drydocking charge but did save 72 hours demurrage on the vessel.

Drydocking 2½ days plus 456 long tons cargo—$2,870.35.

Respondent's Exhibit No. 44—(Continued)

While the vessel was on drydock the Contractor provided the following services:

Fire Line:
Hook up and Disconnection.....$20.00

Fresh Water:
Hook up and Disconnection.....None
Supply .....None

Electricity:
Hook up and Disconnection.....$32.10
Supply 65.00

Steam:
Hook up and Disconnection.....None
Supply .....None

Garbage Removal:
Service .....None

The vessel was placed on drydock at this time April 4, 1958, to survey and effect this side shell plating repair; and no other work was carried out except bottom painting which was not necessary for the seaworthiness of the vessel and also the fairing of two slight nicks in the propeller blade which could have been carried out afloat.

Vessel was placed on drydock at 7:30 a.m. April 4, 1958.

Vessel was undocked at 4:45 a.m. April 7, 1958.

Vessel was last previously drydocked on March 7, 1958, at Chester, Pa. Log books were not examined back to that date.

Respondent's Exhibit No. 44—(Continued)

Repairs were checked, found carried out according to survey and all work done as specified.

/s/ K. A. WEBB,
Surveyor.

Received in evidence January 6, 1960.

Mr. Johansen: Our Exhibit 45 is likewise a signed copy of a Survey Report of cargo damage, which we offer for the same purpose, to show the nature of the damage to the cargo.

Mr. Gearin: We object on the part of cargo, your Honor. The pretrial order provides in Paragraphs I and II that the cargo was aboard the vessel and it was damaged. We have reserved the issue of the amount of damage. I don't see the applicability of an independent surveyor not connected with us giving his opinion at this time as far as the amount of damage is concerned.

Mr. Johansen: Your Honor, in some instances—not all instances—this shows where the various items of cargo were located in the ship, some of it in No. 4 and some of it in No. 5.

The Court: Is that the only purpose of the offer? [22]

Mr. Johansen: We can limit it to that purpose at this time, your Honor, if it is deemed proper to do so.

The Court: Of course, the same question arises on this. The witness is not here for cross-examina-

tion. His idea of the amount of damage would not be binding on either Mr. Wood's client or Mr. Gearin's clients. I would have to reject the offer unless it was limited to something that Counsel would be agreeable to. If it shows the different places where the cargo was stored, maybe Counsel would have no objection to it.

Mr. Gearin: This survey was made, your Honor, according to the terms of it, starting the day after the fire, three days after the fire and eight days after the fire, at a time when most of this cargo had been removed from the vessel.

The Court: As long as you have an objection, I will reject the offer. That is No. 45.

Mr. Wood, I am not sure that I recognized you during the course of the admission of these last exhibits in evidence. You have no objection; is that correct?

Mr. Wood: Not to those that were admitted.

The Court: Yes. Mr. Johansen, do you have anything more to offer in your case?

Mr. Johansen: We have no further exhibits to offer at this time, your Honor. We do intend to call some witnesses. However, we did not anticipate the case would move along this rapidly. We have arranged for them to be here this afternoon. [23]

The Court: Could you have your witnesses here by 1:30?

Mr. Johansen: Yes, we could.

The Court: Is there anything more that we can do at this time?

Mr. Krause: Your Honor, could we have a plan?

I take it that the transcript is not going to be read here in court?

The Court: I will take that up with you. I want to get your ideas on that, Gentlemen. I am here, of course, to hear the reading of the transcript, and if there are any particular parts of the transcript that you would like to emphasize by reading, certainly I feel it is a proper thing to do. On the other hand, of course I will read the transcript if it is not all read here in court. I will read it anyway.

Mr. Krause: Of course, it will be a little difficult to argue the case to the Court unless the Court has read the transcript. I am wondering whether as far as the testimony is concerned that we are going to put on—they are mostly witnesses who have testified in the Coast Guard hearing, and they are only going to testify to matters that were not covered there. If the Court had already read the testimony, it might better appear just how this other testimony will affect the case. I was going to suggest that we adjourn long enough so that the Court could read the transcript before we go on any farther. That might mean the afternoon, I suppose.

The Court: That probably would mean the afternoon. I [24] think, Gentlemen, we had better just proceed. I think I probably can put it together. However, I assume that you gentlemen will want to file some briefs in reply to the brief which has been filed by Mr. Gearin. I don't mean to say that by going ahead this afternoon I am absolutely foreclosing any possible future testimony if it does come up, and you have so stipulated in your pretrial

order. So any time before the closing briefs are filed, if it seems important enough, of course, we could take other testimony.

Mr. Wood, if you file the next brief after we finish here, how much time would you want in which to file your brief?

Mr. Wood: My brief in reply to Mr. Gearin's?

The Court: Yes.

Mr. Wood: I think it would depend a little bit on the testimony he is going to introduce, but I would say a week.

The Court: And then, Mr. Krause, you could reply to both briefs?

Mr. Krause: Yes.

The Court: You would probably want a week or ten days?

Mr. Krause: Not over a week, anyway.

The Court: And then, of course, you would have an opportunity to reply to Mr. Krause's brief.

Mr. Wood: Yes, your Honor.

The Court: And you likewise, so we could take a week for the replies there. [25]

Mr. Gearin: Yes, your Honor.

(Whereupon a recess was taken until 1:30 p.m. of the same day, at which time Court reconvened and proceedings herein were resumed as follows:)

The Court: I think, Mr. Krause, you were going to call some witnesses; is that correct?

Mr. Krause: Yes. We will call Mr. Richard Brewer. [26]

RICHARD BREWER

was produced as a witness in behalf of Respondent Albina Engine & Machine Works, and, having been first duly sworn, was examined and testified as follows.

Direct Examination

By Mr. Krause:

Q. Will you state your name, please?

A. Richard Brewer.

Q. Where do you live? A. In Portland.

Q. How long have you been a resident of Portland? A. For fourteen years.

Q. What is your business or occupation?

A. I am a Superintendent for Albina Engine & Machine Works.

Q. What business is Albina in?

A. My particular phase is ship repair.

Q. They also do some ship construction, do they?

A. Yes.

Q. But your job is in connection with ship repair? A. Yes.

Q. Have Luckenbach Steamship Company during the years that you have been with Albina had occasion to have ships repaired by Albina?

A. Quite frequently.

Q. And you have frequently worked on them yourself, have you? [27] A. Yes, sir.

Q. Tell us just what you had to do with the making of the repairs on the Robert Luckenbach about April 2nd, 1958.

A. I was told that they had some voyage repairs,

(Testimony of Richard Brewer.)

so I went up to the ship and met Mr. Sterling, who told me what repairs they wanted to make.

Q. What day was that, do you recall?

A. No, I don't.

Q. If the fire was on April 2nd, 1958, was it that same day? A. Yes, sir; it was that morning.

Q. About what time of day?

A. As nearly as I can remember, it would have been about 9:00 o'clock in the morning.

Q. You went aboard the vessel? A. Yes.

Q. Where was the ship lying?

A. At Luckenbach Terminal in Portland.

Q. Do you recall which side of the vessel was against the dock? A. The port side.

Q. There you met a Mr. Sterling. What is his first name? A. Herb.

Q. How long had you known Herb Sterling?

A. Oh, I would say about twelve years.

Q. What position did he hold with the Luckenbach Company? [28]

A. He was their Northwest Port Engineer.

Q. Had he been in that same position during the fifteen years that you knew him, or had he held other positions?

A. No, he had been in that same position, to my knowledge.

Q. Did you know a Port Engineer by the name of Ramey? A. Yes.

Q. Did you have the same relations with Mr. Ramey that you later had with Mr. Sterling?

A. Well, Mr. Ramey was their Superintendent

(Testimony of Richard Brewer.)

for the entire area which they serve, where Mr. Sterling was the Northwest area Port Engineer.

Q. Did Mr. Sterling have an assistant, too?

A. Yes.

Q. Do you remember his name?

A. A Mr. Saunders.

Q. Was Mr. Saunders down on the Robert Luckenbach on this morning of April 2nd, 1958, also? A. No, he was not.

Q. Mr. Sterling was there?

A. Yes, sir.

Q. Will you tell us what repairs were ordered and who ordered them?

A. As I remember it, there was about eight items that Mr. Sterling ordered us to do, out of which there were two that I can remember the exact details as to what they were. [29]

Q. What are the two that you remember?

A. Well, one involved removing a section of fire line to be renewed and the other one was renewing a ladder rung in a cargo hold.

Q. In which hold? A. No. 5 cargo hold.

Q. When Mr. Sterling ordered these repairs where were you and he?

A. In the Chief Engineer's room. That is where I met him.

Q. The Chief Engineer of the Robert Luckenbach? A. Yes.

Q. Who else was there?

A. The Chief Engineer was in and out. I think he was there most of the time we were discussing

(Testimony of Richard Brewer.)

the repairs, and I believe he also sent for the Chief Mate to discuss a few items with him.

Q. Are you acquainted with Mr. Radovich?

A. Yes.

Q. Was he employed by the Luckenbach Company at that time? A. Yes, he was.

Q. In what capacity?

A. Well, his title was Marine Superintendent, I believe. He seemed to be in charge of loading the ships and discharging them.

Q. Was Mr. Radovich present also at the time these repairs [30] were ordered?

A. He was there at some time during the conversation.

Q. As nearly as you can recall, will you tell us just what Mr. Sterling said and what the conversation was with respect to these repairs at that time.

A. Well, we discussed removing this section of the fire line for the renewal, and he asked the Chief how he could maintain fire protection on the vessel, and he said——

Mr. Gearin: Just a moment, your Honor. We have no objection to statements made by Mr. Sterling, the Port Engineer of Luckenbach, but we think that statements made by the Chief Engineer would be hearsay.

The Court: What is your position on that, Mr. Krause?

Mr. Krause: These were conversations of employees of Luckenbach Company with Mr. Brewer,

(Testimony of Richard Brewer.)

and this was the conversation that took place during the time that orders were given regarding the removal of the section of fire line. What the Chief Engineer said——

The Court: Would that be said in the presence of Mr. Sterling?

The Witness: Yes, they were all three together.

The Court: Yes. The objection is overruled.

Q. (By Mr. Krause:) You were saying what the Chief Engineer said.

A. He told Mr. Sterling in my presence that he would see our [31] pipefitters would install blanks in the lines so that he could maintain fire protection on the vessel.

Q. Where was this section of pipe in the fire line that was to be removed?

A. It was in the upper engine room.

Q. Was that a pipe that came up from the engine room to the main deck? A. Yes.

Q. What was it there for? That is, when it was in place what did it provide?

A. It provided for water from the fire pump to reach the main deck.

Q. On the main deck were there hydrants to which hoses could be connected? A. Yes.

Q. You said something about placing some blanks after that section of pipe was removed. What are those blanks?

A. Well, they are steel blanks put on with rubber gaskets and forming a watertight joint.

Q. Where were those blanks to be put?

(Testimony of Richard Brewer.)

A. They were to be placed at each end where this section was removed so that he could have fire protection in the engine room from the fire pump, and also he could put a line from the dock onto the ship and maintain fire protection on the deck of the vessel. [32]

The Court: You are speaking of the Chief Engineer. Whom do you refer to as the Chief Engineer?

A. The Chief Engineer of the Robert Luckenbach. I don't recall him by name, sir.

Q. (By Mr. Krause): Do you know whether that pipe was removed, of your own knowledge, that section of the fire line?

A. I didn't actually see it removed; no, sir.

Q. Did you see whether it had been removed after it was removed?

A. That I can't remember.

Q. Then you can't tell us whether these blanks were put on the pipe or not?

A. No, sir; I couldn't.

Q. Now, you mentioned another job that Mr. Sterling directed you to do with respect to a rung in a ladder?

A. Yes, he asked us to renew a missing ladder rung which the Chief Officer had told him was the after-ladder in No. 5 cargo hold.

Q. Did you and Mr. Sterling and any of the other officers of the ship go out to No. 5 hatch to see where that rung was missing?

(Testimony of Richard Brewer.)

A. Mr. Sterling and Mr. Radovich and myself and Mr. Bailey went to No. 5 hatch and looked down to see what the conditions were as far as being practical to renew the rung. Mr. Radovich assured us that the cargo would be out of the after end of No. 5 [33] hold and the way of the ladder by 6:00 o'clock that night, at which time he wanted us to renew it.

The Court: Was Mr. Sterling present when this was said?

A. Yes, he was.

Q. (By Mr. Krause): Is Mr. Radovich this man that you designated as Marine Superintendent?

A. Yes.

Q. Now, you have mentioned Mr. Bailey. Who was he?

A. Mr. Bailey takes care of all of our outside work. My normal work is taking care of Swan Island. That is my job, and he takes care of work that is done away from Swan Island. I was filling in for him that morning.

Q. But he arrived before you had left?

A. Yes.

Q. So he was with you at the No. 5 hatch?

A. Yes.

Q. Did you remain on the vessel after that or did you leave? A. No, I left.

Q. By the way, were these orders for the work that you were to do in writing, or were they oral?

A. They were oral.

(Testimony of Richard Brewer.)

Q. What was the practice regarding the method of authorization of repairs?

A. For that type of repairs it is very normal they are done orally. [34]

Q. On occasions did you get written orders regarding repairs?

A. On occasions. For jobs that they know quite a bit ahead of time that they had to do, they would write up repairs, but these normal voyage repairs, normally they don't know what has to be done until the ship arrives.

Q. When these orders for repairs had been given to you orally were they customarily followed with a written order after you had done the work?

A. Yes, definitely.

Q. Were you on the ship at the time the fire started? A. No, I wasn't.

Q. Were you on there at any time after the fire had started?

A. Yes, I was there later on that night, after the fire was practically out.

Q. The Fire Department were still there?

A. Yes.

Q. Did you participate in the matter of ascertaining what damage had been done to the vessel?

A. Yes, I did.

Q. With whom did you make the survey as to the damage and the type of repairs that would be required?

A. Well, of course, there was the American Bureau of Shipping and the Coast Guard and the

(Testimony of Richard Brewer.)

owner's representatives, who, as I remember, were Mr. Sterling and Mr. Saunders and Mr. Arway, who takes care of their electrical work. [35]

Q. He takes care of Luckenbach Company's electrical work? A. Right.

Q. Any other man representing Albina besides yourself?

A. Yes. Mr. Bailey was there, and our steel boss and I believe our electrical boss was there, also.

Q. When were these surveys made as to the work that would be necessary to be done?

A. A preliminary survey was made the following morning, but it wasn't completed, of course, until all the cargo had been removed. I don't recall just how long that took, but I believe it was about two days.

Q. Can you tell us just generally what damage there was to the vessel?

A. Well, the bulkhead plate between 4 and 5 cargo holds was warped. I don't recall just how much of it. And I would guess approximately 50 per cent of the landing pads were burned and the cargo battens were burned.

Q. These landing pads, what are they?

A. A landing pad is a wooden—there is two 3-inch layers of wood that are placed underneath the square of the open hatch so that when cargo is lowered into the cargo hold it doesn't damage this steel plating under the landing pad.

Q. Is the floor or the lower part of the No. 5 hold over the shaft alley where the propeller shaft is?

(Testimony of Richard Brewer.)

A. Yes. [36]

Q. These boards that were in the square of the hatch of No. 5, what were they placed on?

A. They were placed on the steel deck, and then there is a steel guardrail that surrounds them to keep them in place.

Q. Does that wooden landing pad extend forward or aft from the square of the hatch?

A. No, generally it is the same size as the hatch opening.

Q. You also spoke of cargo battens. Where were they?

A. They are 2 by 6 lumber that is placed against the side of the ship to prevent the cargo from resting against the side of the ship.

The Court: Is that shown in this Exhibit 25-A?

A. Yes.

The Court: That is the batten on the side there?

The Witness: There is the batten on the side. The landing pad is covered with the dunnage.

The Court: What do you mean by the square of the hatch? That is the opening——

A. That is the hatch opening.

The Court: Yes.

Q. (By Mr. Krause): You were referring to Exhibits 25-A and 25-B at this time? A. Yes.

Q. Was there any damage to the plating of the ship, the hull plating? [37]

A. That I don't remember.

Q. Were you on the ship when the fire was finally extinguished? A. Yes.

(Testimony of Richard Brewer.)

Q. Can you tell us about what time that was?

A. As I recall, it must have been around 11:00 p.m., but I wouldn't be sure.

Q. Who advised you as to at what time the work was to be done in the hold? A. Mr. Radovich.

Q. Mr. Radovich? A. Yes.

Q. And that was during the dinner hour from 6:00 to 7:00?

A. Yes, when the longshoremen were off to eat.

Q. In connection with the doing of the work in the hold of the ship and where it is necessary to remove cargo, who in the past, when you were working on the Luckenbach ships, arranged for the removal of cargo?

A. Well, that would be arranged through Mr. Radovich.

Q. In this case who did arrange for the removal of the cargo about the ladder where you were supposed to do the welding?

A. Mr. Radovich.

Mr. Krause: You may cross-examine.

Mr. Gearin: You asked the name of the Chief Engineer. It was George Hebert. [38]

Cross-Examination

By Mr. Gearin:

Q. Mr. Brewer, you spoke of Mr. Radovich. Would that be Mr. Stanley M. Radovich? Do you know his given name?

A. I know his first name is Stanley.

Q. All right. To your knowledge, how long has

(Testimony of Richard Brewer.)

he held or occupied the position of Marine Superintendent for Luckenbach Steamship Company?

A. I wouldn't say for sure, but I would say approximately three years; maybe four.

Q. In the three or possibly four years that you have known Mr. Radovich occupied the position of Marine Superintendent with Luckenbach Steamship Company had he on any occasions ordered from Albina Engine & Machine Works any minor repairs aboard the vessel?

A. He may possibly have ordered some from Albina. My contact with Mr. Radovich was quite narrow compared to our other employees.

Q. You mentioned Mr. Bailey. Is that Richard Bailey? A. Yes.

Q. What is his position with Albina?

A. He is Superintendent. He takes care of our repairs on the waterfront.

Q. From your observations of Mr. Radovich's capacity with Luckenbach Steamship Company can you advise us whether or not [39] Mr. Radovich occupies any supervisory capacity, to your knowledge?

Mr. Wood: I think that calls for a conclusion, your Honor.

The Court: I am certainly inclined to sustain that unless——

Mr. Gearin: I will withdraw it.

The Court: ——unless you can show some difference in admiralty law here.

Mr. Gearin: I will ask a specific question.

Q. During this conversation between the Chief

(Testimony of Richard Brewer.)

Engineer Hebert and Mr. Sterling about the removal of the fire line and Mr. Hebert's statements something about fire protection, was Mr. Radovich present at that time?

A. That I couldn't say.

Q. You have no memory of it?

A. No, I don't have any memory.

Q. Insofar as fire protection on the waterfront in a vessel, is that necessary aboard a vessel during welding? Was fire protection necessary aboard a vessel during welding in the hold?

A. We considered it to be so, and we assume that it is available on a ship when we work on it.

Q. Mr. Brewer, insofar as this particular vessel on this particular day when the repairs were performed, did you have in mind any particular type of fire protection during the [40] conversation with Chief Engineer Hebert and Mr. Sterling?

A. No, I personally did not.

Q. You didn't know what alternative methods were or were not going to be supplied by the ship?

A. No.

Q. At a time when you went back to look at Hold No. 5—I understand that Mr. Sterling was there, Mr. Radovich, Mr. Bailey and yourself?

A. Right.

Q. And that had to do with the repairs to the ladder in Hold No. 5? A. Right.

Q. I will ask you did Mr. Radovich participate at all in the discussions that you had in the after part of the vessel about the repairs in No. 5? Per-

(Testimony of Richard Brewer.)

haps that question is a little complicated in form. I am going to rephrase it if I may, sir. At the time that you and Mr. Bailey and Mr. Sterling and Mr. Radovich went to the aft portion of the vessel, where Hold No. 5 is located, at that time did Mr. Radovich participate in any of the discussions regarding the repair work to be done in the hold?

A. Well, he said that the cargo would be out by the after ladder.

Mr. Wood: I didn't hear what he said.

A. He said the cargo would be out by 6:00 o'clock that night [41] in the way of the repair.

Q. (By Mr. Gearin): I believe you testified that Mr. Radovich gave you advice when the work was to be completed in Hold No. 5?

Mr. Wood: You mean to remove the cargo, don't you?

Mr. Gearin: I will ask that you read the question, Mr. Beckwith.

(Last question read.)

A. Yes, he said that it should be done between 6:00 and 7:00 p.m. that evening.

Q. And the work in Hold No. 5 was the repair of a ladder rung? A. Yes.

Q. Will you state whether or not at that time it was known whether or not welding was to be employed in the repair of the ladder in Hold No. 5?

A. Yes, it was known.

Q. Insofar as the past experience with Luckenbach is concerned, am I correct, sir, in understand-

(Testimony of Richard Brewer.)

ing your testimony that insofar as work to be performed by Albina in holds of vessels of the Luckenbach Steamship Company that Mr. Radovich made the arrangements for the removal of the cargo in the holds in which Albina was to work? Do you want me to ask that question in a different form? Is that a little complicated?

A. Okeh, if you will.

Q. I can ask a non-leading question, I presume. Who made [42] arrangements for the removal of the cargo aboard Luckenbach Steamship Company vessels when Albina had to go into the holds and do repair work? A. Mr. Radovich.

Mr. Gearin: I have nothing further. Thank you, sir.

Cross-Examination

By Mr. Wood:

Q. Mr. Brewer, I think your evidence is pretty plain, but I would like to clarify it, possibly. All this talk about the repair of a ladder, when you and Mr. Sterling and Mr. Bailey and Mr. Radovich were leaning over the hatch coaming and looking down into No. 5 hold, all that talk contemplated the repair of the after ladder, didn't it? A. Yes, sir.

Q. That is all you were talking about?

A. Yes, sir.

Q. Radovich's only participation in that was that he would have the cargo removed from the after ladder in time to do the work there between 6:00 and 7:00, isn't that right? A. Yes.

(Testimony of Richard Brewer.)

Q. There has been a lot made of Mr. Radovich here. Isn't it a fact that his only functions on that dock, so far as you know, were to handle cargo in and out of the ship, hire longshoremen gangs and see that the cargo was stored or the cargo discharged, [43] as the case may be? Wasn't that his job?

A. I would assume so. I am not personally concerned with his responsibilities.

Q. But so far as you know, that was his job?

A. My contact with him was not too great.

Q. And all contracts for repairs between Luckenbach and your company were between your company and Sterling, weren't they?

A. Or another Port Engineer.

Q. Never Mr. Radovich? A. No.

Q. Now, just one more question or series of questions on the same subject. You described the damages to the ship caused by the fire and the conference that the Albina people, including yourself, had with Mr. Sterling afterwards about the repair of that damage. Is it a fact that you or Albina's representatives acknowledged to Mr. Sterling that the fault for the fire was Albina's, the damages were their responsibility, and they were going to repair it without charge to Luckenbach?

Mr. Krause: Just a moment. Your Honor, of course, that would be going into a subject that he wasn't examined on at all. But I think if the question is permitted at all it ought to be split up so that he wouldn't have to answer a question that is

(Testimony of Richard Brewer.)

loaded. I mean he could say Yes or No to various parts of it without being at all wrong and we wouldn't have much of an understanding of his answer. The question has got too many [44] factors in it.

The Court: I think, Mr. Wood, that it could require at least three different answers. I think if you would reframe your question that would overcome that part of the objection, and I will overrule the other part.

Mr. Wood: Yes, I will, your Honor.

Q. Mr. Brewer, you were present, were you not, at these conferences between Sterling and your people about repairing the fire damage, weren't you?

A. Yes, as to the work that was to be accomplished; yes.

Q. The work that was to be done?

A. Yes.

Q. Was Mr. Hussa present? A. No.

Q. Who was present representing your company?

A. As far as the actual work that was to be done, most of those conferences were held right on the ship. I was there, Mr. Bailey was there, and I think our estimator was there.

Q. And Mr. Sterling?

A. And Mr. Sterling.

Q. I think I will have to ask you individually, then. I don't know whether you were in a position of authority, or perhaps it was some of these other men. Did you say to Sterling that your company

(Testimony of Richard Brewer.)

would assume responsibility for the damage and repair it? [45]

A. No, I didn't have any authority for that.

Mr. Krause: Your Honor——

The Court: The question has been answered. He said No.

Q. (By Mr. Wood): Did Mr. Bailey do that?

A. No.

Q. (By Mr. Wood): Did Mr. Bailey do that?

A. No.

Q. Did any of your company within your hearing do that?

A. Not to my personal knowledge.

Q. Do you know whether Mr. Hussa did that?

A. No, sir; I don't.

Q. Mr. Hussa is the President of your company, isn't he? A. Yes, he is.

Q. Do you know this, that your company made those repairs and then billed Luckenbach for them at bare cost without any charge for profit or overhead or anything like that?

A. No, I didn't know that.

Mr. Wood: I guess I have pumped you dry. That is all.

Redirect Examination

By Mr. Krause:

Q. You had been told that this rung was in the after ladder? A. Yes.

Q. Were you advised later that it was in the forward ladder instead of the after ladder? [46]

(Testimony of Richard Brewer.)

A. Yes.

Q. Who told you about it?

A. Mr. Radovich.

Q. Where were you at the time he told you?

A. I was in our office at Swan Island, and he called me on the phone.

Q. Just what did he tell you?

A. He said to go ahead and repair the ladder between 6:00 and 7:00 that evening; however, it was the forward ladder instead of the after ladder.

Q. Was anything more said about whether the cargo would be removed from the base of the ladder at that time?

A. No, nothing was mentioned.

Mr. Krause: You may examine.

Mr. Gearin: I have no questions.

Recross-Examination

By Mr. Wood:

Q. I think there is a slight distinction there, possibly. Mr. Radovich told you, as I understand your testimony, that the rung was in the forward ladder. That is right, is it? A. Yes.

Q. And if any repair was to be made, that was the place where it was. I suppose that was generally the conversation, was it? [47] A. Yes.

Q. But he didn't order you or give you any instructions to go ahead and repair it, did he?

A. No. He said to make the repair——

Q. Didn't you know that he had no authority to order the repairs?

(Testimony of Richard Brewer.)

Mr. Gearin: We object to the question, your Honor.

Mr. Wood: I want to ask him.

The Court: I guess I have to decide that eventually, anyway.

Mr. Gearin: I will withdraw my objection, your Honor.

Q. (By Mr. Wood): You know that, don't you?

A. Whether or not he had authority to order repairs or not?

Q. Yes.

A. We frequently looked to him as to the time that we could do them. I mean it was up to him when the space would be available.

Q. But he didn't give you any specific order or instruction to go ahead and repair that ladder, did he?

A. It happened just the way I stated it. Whether it was an order or not, he said——

Q. Isn't it a fact all he told you was that it was the forward ladder that had the broken rung in it?

A. Yes, sir.

Q. That is all he told you? [48]

A. Correct.

Mr. Wood: That is all.

Q. (By Mr. Gearin): Mr. Brewer, you knew that a ladder was to be repaired in Hold No. 5?

A. Yes.

Q. And when he called you up was there any

(Testimony of Richard Brewer.)

understanding about why he—strike that. I don't want to ask a leading question, your Honor.

The Court: It is obvious why he called.

Mr. Gearin: All right. I have nothing further.

Mr. Krause: I think that is all.

The Court: I have this one question: Is there any other feasible method for the repair of this rung other than by welding?

A. No. A temporary rung was there, and they wanted to take the temporary rung out and put a permanent rung in.

The Court: And that would require welding?

A. Yes, definitely.

The Court: When you say it would require welding, would it be this particular type of welding, or would there be a different type welding——

A. No, this would be the only feasible type.

The Court: That is all.

(Witness excused.) [49]

J. R. BAILEY

was produced as a witness in behalf of Albina Engine & Machine Works and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Krause:

Q. Your name is J. R. Bailey?

A. Yes, sir.

Q. Where do you live?

(Testimony of J. R. Bailey.)

A. In Portland.

Q. How long have you been a resident of Portland? A. Forty years.

Q. Whom are you employed by?

A. Albina Engine & Machine.

Q. How long have you been employed by them?

A. Eighteen years.

Q. What is your present capacity?

A. I am superintendent of the ship repair department.

Q. Did you have that same position on April 2nd of 1958? A. Yes.

Q. Have you frequently worked on Luckenbach vessels? A. Yes.

Q. The Luckenbach vessels were regular visitors in the Columbia River, were they?

A. Yes, sir.

Q. And frequently Albina made repairs on them? [50] A. Right.

Q. Would you tell us during the several years prior to this fire, Mr. Bailey, just what did you have to do with receiving orders for repairs on the Luckenbach ships? Tell us how they were given and who gave them.

A. Quite often they came in the mail in writing, and quite often they were phoned from Seattle. Quite often they were given verbally by the port engineer after the vessel was there and we were working on it on other repairs.

Q. Who wrote those letters from Seattle?

(Testimony of J. R. Bailey.)

A. Either Mr. Saunders or Mr. Sterling that I know of.

Q. Who was Mr. Sterling?

A. Mr. Sterling was the port engineer. I was best acquainted with him.

Q. He was the port engineer. What was Mr. Sterling's position?

A. Well, he was port engineer in charge of the repair work in Washington and Oregon districts, I believe, but there was another man that handled California.

Q. You are speaking of Mr. Ramey, are you?

A. No. I never had any acquaintance with those people.

Q. At any rate, here in Oregon and Washington Mr. Sterling held that position?

A. That is my understanding of it.

Q. Now, who is Mr. Saunders?

A. Well, he also was a port engineer and I think Mr. Sterling's [51] assistant.

Q. You say when the letters came from Seattle they came from either Sterling or Saunders?

A. Yes, as far as I know.

Q. When they came by telephone whom did you get the orders from?

A. Well, that was pretty nearly always Mr. Sterling. I don't recall Mr. Saunders ever calling work down to us.

Q. Besides Mr. Sterling and Mr. Saunders were there any other men that ever gave you orders regarding repairs?

(Testimony of J. R. Bailey.)

A. Well, Mr. Arway did as regarding electrical work.

Q. When the orders were given to you orally where was that usually done?

A. You mean on board the ship? I mean usually on board the ship after we had seen there was other work that needed doing.

Q. You would be on board the ship and you would meet there with whom? Who would meet there on the ship?

A. Well, if there was a port engineer—if there was a job that a port engineer came down on we would meet the port engineer on the ship.

Q. That would be either Sterling or Saunders?

A. Yes.

Q. Then these orders that you would get on the ship for repairs, how were they usually given? Would they write out any order there or would they give it to you orally? [52]

A. Oh, they always gave it to us orally first, but after they had a chance to look at it themselves, quite often the same day—sometimes the next day—they would have written it down in form.

Q. Then you would get a written work order?

A. Usually by the time the job was done.

Q. When did you get onto the Robert Luckenbach on the morning of the 2nd of April, 1958?

A. As I recall, around 11:00 in the morning.

Q. Was Mr. Brewer already there?

A. Yes.

(Testimony of J. R. Bailey.)

Q. When you got there? A. Yes.

Q. Now, who else did you see there and have dealings with regarding repairs to the vessel?

A. Well, by that time the work was all in hand, and Mr. Brewer told me what work was in hand and what jobs we had to do on the ship.

Q. When Mr. Brewer told you that, who was there?

A. Oh, he was with Mr. Sterling when I met him on the ship.

Q. Then Mr. Brewer already knew what was to be done? A. Yes.

Q. Did you go to No. 5 hatch? A. Yes.

Q. Where you were shown what ladder this rung was missing from? [53]

A. Yes, we went to No. 5 hatch to look for this rung that was missing. In fact, I believe as I came aboard they were on their way to No. 5 hatch.

Q. You joined them there? A. Yes.

Q. Who was there?

A. Mr. Bailey and Mr. Sterling and Mr. Radovich.

Q. Any of the officers of the ship?

A. Not certainly the mate, because we went back to hunt for the mate later.

Q. Do you recall any other officer?

A. No, I don't.

Q. Then at that time, when you looked down in the No. 5 hatch what was the condition of the cargo in the hatch with respect to the ladder, the after ladder?

(Testimony of J. R. Bailey.)

A. Only the after end of the hatch was uncovered to the lower hold, and the after ladder was —the lower hold was covered with conduit and we couldn't tell how high up—there was no place that a tank top was exposed so we could judge how deep the conduit was, but through the after section of the landing pad, approximately a third, and on under the coaming as nearly as we could tell was all conduit and pipe.

Q. Did you see any part of the ladder where there was a rung missing?

A. No, I didn't. [54]

Q. So at that time, at any rate, you understood that you were to repair or replace a rung in the after ladder? A. Yes.

Q. Now, did you receive any instructions to the effect that the rung was not to be put into the after ladder?

A. Not at that time. Later in the day, yes.

Q. When did you get the orders?

A. It must have been about 4:00 in the afternoon. It was late in the afternoon.

Q. Who advised you then that the rung was in the forward ladder? A. Mr. Brewer.

Q. Mr. Brewer did that? A. Yes.

Q. Did another of the jobs that you were to do have to do with this pipe in the engine-room fire line? A. Yes.

Q. Who provided the crews that were to take care of that?

(Testimony of J. R. Bailey.)

A. You mean the pipefitters?

Q. Yes, the pipefitter crew.

A. Well, Beck had already been called. However, they came after I was on board the ship.

Q. Were they under your direction, too, the pipe crew? A. Yes.

Q. What was the name of the foreman? [55]

A. Beck.

Q. Of the pipefitter crew? A. Yes.

Q. Mr. Beck. Did you see the pipe removed?

A. Yes.

Q. Did you see what they had done to the ends of the pipe where they had taken this section out?

A. Yes, sir.

Q. What did they do to it?

A. They blanked it with steel blanks and rubber gaskets, both ends.

Q. Was that blank there to make it watertight?

A. Yes, sir.

Q. By the way, had you had any conversation with anyone representing the Luckenbach Company as to how fire protection was to be maintained while that section of pipe was out?

A. No, sir.

Q. You didn't. Do you remember whether there are any fire hydrants on the dock of the Luckenbach Company in the vicinity of where the vessel was docked? A. Yes, sir.

Q. Are you familiar with the connections, the couplings, where they hook up the fresh water from shore to their fresh water tanks?

(Testimony of J. R. Bailey.)

A. Yes, sir. I am familiar with it on the Robert Luckenbach, [56] anyway.

Q. And also where the coupling to hook up the shore water to their fire line is? A. Yes, sir.

Q. Could you tell us where those couplings were with respect to the gangplank going ashore?

A. They are almost directly at the gangplank at the main deck, the after port corner of the main deckhouse in this case.

Q. The after port corner of the main deckhouse?

A. Yes.

Q. That is about in the center of the vessel when you are going fore and aft?

A. I would say it was after of the center pretty well, Gunther.

Q. But the deckhouse is just about in the center fore and aft of the vessel, the entire deckhouse and the bridge; is that right? A. Yes.

Q. But the place where these couplings were was at the after port corner? A. Yes.

Q. Now, did you designate the crew that was to do the welding in No. 5 hold?

A. Not the individuals, no.

Q. You didn't. You gave orders to somebody else at Albina? A. Yes. [57]

Q. And they designated who was to go aboard the ship? A. Right.

Q. Now, were you there at the time the welding was done in No. 5 hold? A. No, sir.

Q. When had you left the ship that day?

(Testimony of J. R. Bailey.)

A. I don't recall.

Q. Did you leave shortly after you had met with Mr. Brewer aboard the ship? Did you leave soon after that?

A. I no doubt left but I was back again in the afternoon. I had another ship that I was working on, too.

Q. Were there other jobs going on that Albina was doing on the Robert Luckenbach at this time?

A. Yes, sir.

Q. And these two jobs were not all of them?

A. No.

Q. When did you learn of the fire on the Robert Luckenbach?

A. Some time after 6:00 and before 6:30.

Q. Did you go down to the vessel?

A. Yes, sir.

Q. Was the fire department on board when you got there? A. Yes, sir.

Q. Were there any of your men working on the ship at that time? A. No. [58]

Q. Other than these men that had been in No. 5 hold to do the welding? A. No.

Q. Did you have anything to do with the extinguishing of the fire? A. No.

Q. The fire department took care of that?

A. Yes, they were at work when I got there.

Q. Did you remain there until after the fire was out? A. Yes.

Q. Did you participate with anyone represent-

(Testimony of J. R. Bailey.)

ing the Luckenbach Company in the determination of what repairs would have to be made to the ship after the fire? A. Yes, sir.

Q. Who were the people representing the Luckenbach Company?

A. Mr. Saunders, Mr. Sterling and Mr. Arway that were definitely representing Luckenbach. Mr. Slater was there, but I don't know who he was representing. And of course the American Bureau of Shipping had a surveyor there, whom I assume was representing the ship.

Q. Yes, the American Bureau had a surveyor, but we are interested particularly in representatives of the Luckenbach Company. A. Yes.

Q. Was there finally a summation made of the repairs that would have to be done because of the fire? [59]

A. Yes, they agreed on something that should be done.

Q. A list of work that was to be done?

A. Yes.

Q. You say they agreed. Now who agreed?

A. I don't know that.

Q. Was there a list of repairs prepared that were to be made? A. Yes, sir.

Q. Whom did you discuss that with representing the Luckenbach Company?

A. I was in charge of making the repairs, and I no doubt discussed them with each of the three men I mentioned: Mr. Saunders, Mr. Sterling and Mr. Arway.

(Testimony of J. R. Bailey.)

Q. After the items of the repairs had been prepared, what took place then in connection with your doing the repairs? Just tell us what went on.

A. They discharged the cargo from No. 4 and 5 hatches and they hauled the ship to dry-dock and we dry-docked it.

Q. You did the repairs in dry-dock?

A. Yes, sir.

Q. Was that because plates on the side of the ship had to be removed? A. Yes, sir.

Q. And new ones installed? A. Yes, sir.

Q. Were there any plates in the bulkhead between 4 and 5 that [60] had to be removed?

A. Yes, sir.

Q. And new ones put in? A. Right.

Q. Just tell us briefly what the other work was.

A. We also made an insert in the 'tween deck in the No. 5 hold in the 'thwart forward corner. That would be in the way directly over the fire. The way directly under the fire was to the tank top and the plate that we renewed across on the side of the ship was across the tank top on the deep tank so that the deep tank had to be cleaned. I am not sure whether we did any repairing to the tank top or not, but it must be on the list of repairs.

Q. Who authorized you to go ahead and do the work? A. I don't know.

Q. Can you tell us just what took place? What did Mr. Sterling or Mr. Saunders or either one

(Testimony of J. R. Bailey.)

of them say with respect to your proceeding with the work?

A. Well, after this there was no longer a casual thing like verbal orders. They had all these surveyors there and everybody wrote down this and that, and they no doubt discussed it at the same time and finally reached a list of the work. By this time everything was in writing.

Q. Of what repairs were to be made?

A. Yes. And, of course, they had the cargo to take out—I [61] mean it wasn't like a voyage repair. It was something that—while the cargo was being discharged these things could be written down, and when it was done we had a written list of work to do, and the ship was available to us and the dry-dock was made ready and we dry-docked the ship and started the work. But who actually put the work in hand I really don't know.

Mr. Krause: All right. You may cross-examine.

Cross-Examination

By Mr. Wood:

Q. When you say "who put the work in hand," that is a phrase meaning who authorized the work. Is that what you mean?

A. That is what I intend it to mean.

Mr. Wood: That is all.

(Testimony of J. R. Bailey.)

Cross-Examination

By Mr. Gearin:

Q. Mr. Bailey, your initials are J. R.?

A. Yes, sir.

Q. Are you the same Richard Bailey who testified before the Coast Guard? A. Yes, sir.

Q. Do they call you Dick?

A. Yes, they do.

Q. When you arrived aboard the vessel at 11:00 o'clock in the [62] morning who was in charge—you or Mr. Brewer?

A. Ordinarily this would have been my job from the start. It happened that we had a Waterman ship coming in and the Waterman port engineer arrived on the same morning, and Mr. Brewer, as he often does, had offered to take care of meeting one man while I met the other, fully knowing that I would eventually come over and take care of my own work.

Q. Mr. Brewer is your right hand; is that right?

A. I think I am more his right hand in this case. It was the other way around.

Q. Now, at the time when you knew that this section of five-inch fire line was removed—you saw that it was removed, I take it from the testimony?

A. Yes, sir.

Q. Do you know what effect that has upon the vessel being able to pump water to the deck side fire hydrants? A. Yes, sir.

Q. What effect would it have?

(Testimony of J. R. Bailey.)

A. Without some cross-connection, I mean manually made, you can't pump from the pump to the fire lines.

Q. So the main fire lines on board the vessel would have been inoperative from the moment the fire line had been removed; am I correct?

A. You are correct. Everything at the height of the main deck or higher would have been inoperative. [63]

Q. Was there at the dock a water hydrant by which lines from the vessel could be attached in order that there would be water in the main fire line aboard the vessel? A. Yes, sir.

Q. Were you able to see that from your position as you were walking down the gangway?

A. Yes, sir.

Q. So that when Mr. Sterling and Mr. Radovich left the vessel they could have determined by this same expedient of looking to the right or left whether or not there had been a connection to the vessel? A. Yes, sir.

Q. By the same token, when you left the vessel, had you looked, you could have seen whether it was hooked to that. Now, at any time did you make any investigation, Mr. Bailey, to determine whether or not there had been an alternative line supplied to the vessel? A. Prior to the fire?

Q. Prior to the fire. A. No, sir.

Mr. Gearin: I have no further questions.

Mr. Krause: That is all.

(Witness excused.) [64]

R. V. BECK

was produced as a witness in behalf of the Respondent Albina Engine & Machine Works and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Krause:

Q. What is your full name, Mr. Beck?

A. R. V. Beck.

Q. Where do you live?

A. In Portland.

Q. How long have you lived in Portland?

A. About twenty years.

Q. By whom have you been employed on and since the 2nd of April, 1958?

A. Albina Engine & Machine.

Q. How long have you been an employee of theirs? A. About sixteen years.

Q. On April 2nd, 1958, what was your position with Albina?

A. General Foreman and pipefitter.

Q. On that date from whom did you get instructions to do some work on the ship?

A. Mr. Brewer.

Q. Mr. Brewer. Did that work involve taking out a section of the water line?

A. A section of the fire line.

Q. Of the fire line? [65] A. Yes.

Q. Can you tell us how big that pipe was?

A. Oh, it was 5-inch pipe, and probably, as I recall it, about six feet or seven feet.

(Testimony of R. V. Beck.)

Q. In length?

A. And it was shaped. It was bent.

Q. It was five inches in diameter?

A. Five inches in diameter.

Q. This pipe ran from where to where?

A. Well, it came out from the pump in the engine room and onto a tee which distributes water fore and aft on the main deck.

Q. Did you go aboard the vessel and remove that section of pipe? A. I did.

Q. And you had some other men with you, I suppose?

A. That is right; two other men.

Q. What had to be done to take the section of pipe out?

A. Well, all we had to do was unbolt it. It was flanged in, and we unbolted it and put some blanks on that we are required to put on.

Q. Do you know why you were taking that section out?

A. Well, because the pipe was deteriorated, leaking, and they wanted a new section.

Q. The blanks that you put on, were they watertight? [66] A. Yes.

Q. What was the effect of taking that section out and blanking off the two ends? What would they then have in the way of fire protection or water in their fire lines?

A. Well, they would have fire protection in the engine room from the fire pump, and by putting a

(Testimony of R. V. Beck.)

tee to a shore line they would have fire protection on deck.

Q. But the water would have to come from the shore?

A. Or have a jumper from between these two connections, take the blanks off and put a jumper on.

Q. They could have made a by-pass and it would have been possible to carry the water during the time that this new pipe was being fitted?

A. It could have been done.

Q. Do you know about when you removed the section of pipe and blanked off the ends?

A. About what time?

Q. Yes.

A. I think we started right after lunch, 12:30, and between 2:30 and 3:00 we went ashore with the pipe.

Q. Then I suppose the next day after the fire you re-installed it, did you?

A. Well, we made it that afternoon and evening, and then we had to send it out to the galvanizers, and then early the next morning after the fire, why, we re-installed it. [67]

Q. The re-installation took place the next day?

A. The next day; yes, sir.

Mr. Krause: You may cross-examine.

Mr. Gearin: We have no cross-examination.

(Testimony of R. V. Beck.)

Cross-Examination

By Mr. Wood:

Q. Mr. Beck, would you say that the removal of this section of fire line constituted normal voyage repairs? A. Yes, sir.

Mr. Wood: Thank you. That is all.

(Witness excused.) [68]

LESTER L. SMITH

was produced as a witness in behalf of the Respondent Albina Engine & Machine Works and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Krause:

Q. Your name is Lester L. Smith?

A. Yes, sir.

Q. Where do you live, Mr. Smith?

A. Portland.

Q. How long have you lived in Portland?

A. Well, in the vicinity since 1914.

Q. Whom are you employed by?

A. Albina Engine & Machine Works.

Q. Were you employed by them on the 2nd of April in 1958? A. Yes, sir.

Q. Were you one of the witnesses called in the Coast Guard hearing, Mr. Smith?

A. Yes, sir.

(Testimony of Lester L. Smith.)

Q. You testified there? A. Yes, sir.

Q. About what time did you report aboard ship?

A. Shortly before 6:00, I would say; a few minutes before 6:00.

Q. What work were you supposed to do? What had been your orders? [69]

A. To put a rung in the ladder, No. 5 lower hold forward.

Q. When you got there what were the conditions that you observed?

A. Well, I went down there and I noticed there was cargo in the hold forward of the ladder, but the rung being so low situated I figured that I could build a barricade around it.

Q. Were you the foreman of this crew?

A. Yes, sir.

Q. And you had two men with you?

A. Yes, sir.

Q. Who were they?

A. Mr. Riley and Mr. Larson.

Q. Now, you described in your Coast Guard testimony just what precautions you had taken, did you? You did testify regarding the precautions taken? A. Yes, sir.

Q. Now I want you to tell us just what you were doing before the fire started. What were you doing or in the act of doing?

A. That started the fire, you mean?

Q. Yes, just before the fire started.

A. Well, I was standing there with Mr. Larson, and we were trying to install this rung, which I

(Testimony of Lester L. Smith.)

had burned up on the main deck and brought down.

The Court: You had done what on the main deck?

A. We had burned it for length up on the main deck, your [70] Honor. But there was a little nubbin of weld from the old rung on the inner side of the stringer of the ladder, partway up the ladder, and I had Mr. Larson strike the arc to try to melt this little nubbin of weld off so we could get the rung in place, so that he could weld it in place. And, as I say, I had this barricade prepared. As soon as he struck the arc the sparks fell on the bottom, and I thought I would check behind the barricade to see whether any fire had started or not. And it had.

Q. Where had the fire started?

A. Well, it started the lint on one of these bales. They had some burlap bales down next to the deck, and when it hit this lint it just flash-fired, and she carried through to where I couldn't get it. I had a can of water there and I threw it onto the exposed fire that I could get at, but it was back in between the bales where I couldn't extinguish it.

Q. Was the can of water that you had similar to the one that you see sitting over there on the window sill? A. Yes, the very same type.

Mr. Krause: That is Exhibit No. 26.

Q. About how full of water was it?

A. It was full right up to the neck.

Q. And had you taken that——

A. I say up to the neck. I mean it was up in—

(Testimony of Lester L. Smith.)

the large part of the can was full. It wasn't overflowing, I wouldn't say, or anything, but it was practically full. [71]

Q. Where was that can sitting at the time the fire started?

A. At the time the fire started it was sitting right at the forward ladder, right with me.

Q. Had you placed it there? A. Yes.

Q. When you had thrown the water on there the fire had not been extinguished, had it?

A. No. As I say, it had crawled back between the bales. And I tried to put it out with my hand or with a stick. It wasn't any—sure, it was a serious fire, but it wasn't any hot fire. It was just this lint burning on the bales actually at the time. But I couldn't get at it, so I proceeded to go up and try to get a fire hose down there.

Q. What did you do then?

A. Mr. Riley was standing there, as I recall it, and I hollered at him to go and get a fire hose, and I told Larson to stay down there. And Riley and I went up, and we started to get the fire hose out of this fire hose rack, which was right at the top of the hatch, at the forward end of the hatch. And after we got the hose out while he was lowering it I went to the engine room and asked them to start the fire pumps. Now I am not positive as to calling for the Fire Department, whether it was on my way down or the way back or on the following trip that I called—or told the guard to call the Fire Department.

(Testimony of Lester L. Smith.)

Q. The guard you are talking about is the gangway guard, now? [72]

A. Either Burns or Pinkerton. I don't know which they had on the ship at that time.

Q. You made a trip down into the engine room and came back up on deck? A. Yes, sir.

Q. What did you ascertain then as to whether there was any water in the hold?

A. I went back and asked Riley—I got close enough to Riley to where I could holler to him and ask him if they had any water. He said, "No water yet." So I proceeded to go back to the engine room again.

Q. Do you know whether the hydrant had been turned on? A. Yes, sir.

Q. It had been turned on?

A. Yes, sir. The second time I am positive it was.

Q. Then you went down again. What for?

A. Well, to try to get them to turn the fire pumps on.

Q. When you got down the second time did the men in the engine room tell you whether the pump was working or not?

A. No, I told him—I says, "I haven't got any water on deck yet." So I think it was the second time—well, I know it was the second time, I got this guy on land, I am practically positive, and I told him we didn't have water on deck yet. And I went down below and I went back up, and we still didn't have water. So I made one more trip down

(Testimony of Lester L. Smith.)

to the engine room, and [73] the man down there told me, he said that the fire pumps were running. He said, "Go up on deck; the trouble is up on deck somewhere."

Q. Had you known of the fact that this fire line on the main deck had been severed?

A. No, sir.

Q. That is, before the fire you didn't know about it? A. No, sir.

Q. Now, where had Larson been during all this time?

A. He stayed down in the hold with the fire hose.

Q. When you came up from the engine room the third time, was he still down in the hold?

A. Yes, sir.

Q. What can you say as to the extent of the fire at that time?

A. Well, there was smoke rolling out of the hold, but it wasn't so bad but what a man could stay down there. In fact, Larson was still down there. It was confined to the forward area of the hold.

Q. Now, did you see Mr. Radovich there?

A. No, I didn't. He may have been, but I don't remember.

Q. You didn't see him before the fire?

A. No, sir.

Q. Did you see him at any time after the fire had started?

A. Not that I remember, no.

(Testimony of Lester L. Smith.)

Q. Now, what sized hose was this that you had lowered down [74] into the hold?

A. 2½-inch fire line.

Q. Did it appear to be in good condition?

A. Beg pardon?

Q. Did the hose appear to be in good condition? A. It seemed to be, yes.

Q. Did you get any water through it at any time? A. No, sir.

Q. Now, can you give us some estimate as to how long it was before you had gotten the hose down in there to Larson from the time the fire started?

A. Well, that is pretty hard to answer exact. I didn't spend any time at all down there to amount to anything when I seen I couldn't get the fire out. We went right up to the top. It was just a matter of opening the door and dropping the hose over the hatch.

Q. Can you give us some estimate of how far you had to travel from down below up the ladder to the deck and over to the hydrant, where the hose was?

A. Oh, I would say within a couple of minutes.

Q. What do you mean by a couple? Is that two minutes?

A. Two minutes, yes, I would say. That is two years ago, but I know I did it just as fast as I could. That is all I can say.

Q. Then you ran down into the engine room twice? A. Three times. [75]

(Testimony of Lester L. Smith.)

Q. Three times, yes. And when you came back up again the third time Larson was still down below? A. Yes, sir.

Q. How much time had gone by by then, would you estimate?

A. Oh, between five and ten minutes, I would say.

Q. Between five and ten minutes. At that time the fire was still confined to the forward part of the hold? A. Yes, sir.

Q. Now, while Larson was still down there if you had been able to obtain water in that hose could you have controlled the fire?

A. While Larson was down there, yes, very definitely.

Q. What did you say was burning at that time?

A. Well, as I say, at the time that I left it was just the fuzz on the burlap. No doubt some of the burlap had caught fire by that time. I wasn't down there, and I couldn't say exactly. But there wasn't so much cargo there but what a man could put it out with a fire hose if he was able to stay down there with the smoke, which Larson was at the time. That is the only reason I say that a man could control the fire. There wasn't a big area of fire there, and he was able to stay down there with the smoke and able to use the hose on where the fire was at that time.

Q. Now, up to that time had there been any damage to the vessel, to the ship itself? [76]

A. No, there wasn't that much heat at that time.

(Testimony of Lester L. Smith.)

Q. Had the cargo battens started burning yet?

A. Not that I know of; not visibly, no. Larson could answer that better than I could. I was up on top.

Q. How much longer was it before the Fire Department arrived? A. I don't——

Q. Strike that question. Just a moment, Mr. Smith. Did some of the members of the crew appear at any time and also get to work on the fire lines?

A. Not to my knowledge.

Q. You didn't see any of them? A. No.

Q. Now, give us an estimate as to how long it was after you had been down into the engine room the third time, and Larson was still down in the hold—how long after that was it before the Fire Department arrived?

A. Well, it seemed like a long time. Now, I couldn't give you an exact figure on when the Fire Department arrived.

Q. We know you can't give an exact figure. What is your best judgment on it?

A. You get a man as excited as I was, it is pretty hard to tell you——

The Court: Can you give us your best estimate on it?

A. Well, I don't know. At the time I thought—I would stand corrected on it, but I would say at least fifteen minutes. [77]

Q. During all that time, at least, until the Fire Department came was there any water available to place on the fire at all?

(Testimony of Lester L. Smith.)

A. Not before the Fire Department came; no, sir.

Mr. Krause: You may cross-examine.

Cross-Examination

By Mr. Gearin:

Q. Mr. Smith, the only protection that you had for fire was the can that we have talked about that is over on the window sill, Exhibit No. 26?

A. Besides the barricade I had; yes, sir.

Q. Now, you say that you had a barricade?

A. Yes, sir.

Q. Did you have any barricade on the starboard side of the ship? A. Yes, sir.

Q. Did you have one on the port side?

A. Yes, sir.

Q. After Mr. Larson struck an arc did you not tell him to hold it because you wanted to look to see if there was any fire?

A. Behind; yes, sir.

Q. You knew before he started the arc, started to knock off that remnant of ladder rung, that there would be sparks coming from the cutting? [78]

A. Yes, sir.

Q. And you anticipated that there might have been sparks getting into the burlap, and that is what caused you to say, "Hold it; I want to see"?

A. I didn't anticipate it, no. I was trying to take precautions.

Q. I know that, sir, but the reason that you did

(Testimony of Lester L. Smith.)

take a look to see if there was a fire was because there was the possibility of fire?

A. A possibility, yes.

Q. Yes. And you have been welding for some period of time?

A. Well, I have been associated with them down there since '42, yes.

Q. You are the foreman of the boilermakers down there? A. The night shift, yes.

Q. Prior to the time that you started welding did you make any inquiry to see whether or not there was water available in the fire lines aboard the vessel?

A. No. I assumed there was. They always have—I mean the fire lines are available.

Q. Now, were the ladder brackets attached to the center-line column in the forward end of Hold No. 5? A. Yes, sir.

Q. Did you place two pieces of plywood sheets that the longshoremen use as walking boards about the center column, one on [79] each side?

A. One on either side of the center-line column.

Q. One piece extended from the column to the port side and the other started out from the column on the starboard side?

A. Well, and at an angle aft, yes. The ladder sits offset on the column.

Q. Did you then place a heavy cardboard carton on the port side of the ladder running fore and aft?

A. Yes, but—I put this pasteboard carton there,

(Testimony of Lester L. Smith.)

yes, and I put the three sheets of plywood—I was using three pieces of plywood.

Q. Did you at that time figure that any sparks would go to the port side of the center line?

A. Not necessarily, no.

Q. Did you place any cartons on the starboard side of the place where you were working?

A. No. As I say, this ladder is off the center line, and on the starboard side I could put this piece of plywood against the column and point it at an angle aft. On the port side I couldn't do it, because the ladder protruded by there, so I put that directly athwartships, and the other one, that was against the paper carton directly fore and aft.

Q. I will ask you, Mr. Smith, if at the time that you made these arrangements prior to the time that the welding or the burning began you figured if any sparks rolled they would go [80] to the port side of the center line, and that is why you didn't place any cartons on the starboard side of the place where you were working? A. No, sir.

Q. All right. Now, I am going to hand you, through the courtesy of the Bailiff, a two-page statement which has been contained in Libelants' Exhibit No. 7, and I will ask you, Mr. Smith, if your signature appears on the bottom of those pages. A. Yes, sir.

Q. In front of your signature on each of those pages does there not appear in your own handwriting, "Read and found O.K."?

A. Yes, sir.

(Testimony of Lester L. Smith.)

Q. Do you remember giving a statement to a Mr. Forrest Johnson on the date shown on the top of that statement, a tall, gray-haired man?

A. I thought you was the gentleman that I spoke to. I am not kidding you. I remember having him—whoever took this statement—having him strike some of this.

Q. Did you read it before you signed it?

A. Well, between the two of us we did, yes.

Mr. Gearin: May I approach the witness, your Honor?

The Court: Yes.

Q. (By Mr. Gearin): Now, I know this has been two years ago. This statement was taken on what date, for the benefit of the Court, please? [81]

A. May 5th.

Q. 1958? A. Yes, sir.

Q. I am going to ask you if the statement to which I am going to direct your attention is contained in the statement that you have signed at that place. First, the address, 1928 Southeast 130th Avenue, is your home address? A. Yes.

Q. "I then placed a heavy cardboard carton on the port side of the ladder running fore and aft. I figured if any sparks rolled they would go to the port side of center line. That is why I did not place any cartons on the starboard side of the place where we were working."

Did I read that correctly?

A. Well, the only reason——

The Court: Did he read it correctly?

(Testimony of Lester L. Smith.)

A. Yes. Yes, he did.

The Court: All right.

A. I could have made that statement—pardon me—and the only reason, I explained about this ladder is off to the port side of the center, and this cardboard carton, I also had a piece of plywood lying up against this cardboard carton.

Q. In the sentence that I directed your attention to I note a correction in a different-colored ink and the words "of center [82] line," the word "rolled," and the word "a." I will ask you if those corrections to that sentence were not made by you.

A. Yes, sir.

Mr. Gearin: We offer this. May I ask that this be marked as Exhibit 7-A, Mrs. Mundorff, No. 7 being our sealed exhibit for impeachment purposes only. When marked I will pass it to Counsel. We intend to offer it for impeachment.

Mr. Krause: We have no objection, your Honor.

The Court: Admitted.

(The statement of Lester L. Smith, above referred to, was received in evidence as Libelants' Exhibit 7-A.)

1928 S.E. 130th Ave.
Portland, Oregon.
May 5, 1958.

My full name is Lester L. Smith.
I reside at the above address - Phone Al. 4-4816.
I am employed as a foreman of boilermakers by Albina Engine & Machine Works.
On April 4, 1958 at about 5:30 P.M. I went into the lower hold #5 of the S.S. Robert Luckenbach & prepare for work to be done to replace a ladder rung on the forward ladder. The longshoremen were leaving the ship so I looked at the work to be done. I took two pieces of plywood sheet that the longshoremen were walking boards & I put one on each side of the center line column to which the ladder brackets were attached. one piece extended out from this column to the port side & the other piece extended out from this column to the starboard side. I then placed ~~one~~ heavy cardboard cartons on the port side of the ladder opening free & aft. I figured if any spuds ~~fell~~ rolled they would go to the port side of the ship & that is why I did not place any cartons on the starboard side of the place where we were working. I placed some dunnage lumber down on the deck as a precaution against any spuds getting underneath this I skipped overgarments that I had put up.

My welding cable cut the ladder rung to length upon my instructions up on the main deck. They then brought the ladder on down into the hold. I went to get a bucket of water but I found a bucket of water 2½ to 3 gallons which the longshoremen had been using as drinking water & I figured to use this if any fire started.

I tried the ladder rung for length & I found my old

Read and OKed Lester L. Smith

(Testimony of Lester L. Smith.)

Mr. Gearin: I have nothing further, your Honor.

Cross-Examination

By Mr. Wood:

Q. Mr. Smith, I am thinking about these times. You said you came on board the ship a little before 6:00 o'clock, didn't you?

A. Yes, sir. The reason I say that, the longshoremen, some of them, were just leaving.

Q. You came on ahead of your own two associates, did you?

A. The men were already there.

Q. You mean Larson and Riley?

A. Larson and Riley were already there. [83]

Q. You got there about 6:00 o'clock, then, or did you get there before 6:00?

A. No, before 6:00.

Q. How much before?

A. A very few minutes. The longshoremen working—some of them were coming off yet.

Q. A very few minutes, you say. Do you mean three or four or five minutes?

A. Yes, I would say so.

Q. The welding machine—I am not very familiar with it, but it is quite large; it is wheeled aboard from the dock, isn't it?

A. It is on a four-wheel trailer. The welding machine is on a four-wheeled trailer.

Q. Was that already on the ship?

A. No, sir. We didn't take it on the ship. It was on the dock.

(Testimony of Lester L. Smith.)

Q. But you wheeled it out from the dock adjacent to the ship?

A. I helped the men roll it adjacent to the No. 5 hatch.

Q. Did you do that after you arrived at the ship? A. After we arrived at the ship.

Q. So that would occupy what part of these minutes before 6:00 o'clock?

A. Well, very few. I mean it was right there, and that is the first thing we did as I got there, before I ever went down in the hold. [84]

Q. Then I understand you lowered some welding wires down into the hold, didn't you?

A. Well, the men did. I was down in the hold.

Q. You were already down there?

A. Yes, sir; I was down in the hold.

Q. You didn't bring any fire-fighting equipment aboard with you, did you? A. No, sir.

Q. This can that we have talked about, this water can, that was nothing you brought aboard? You found it down there?

A. I was going out of the hatch to get a bucket of water at the time that I found this can down there.

Q. You found it?

A. At the after ladder.

Q. And decided to use it? A. Yes, sir.

Q. When you got down in the hold I suppose that would be by now a few minutes after 6:00, would it? I am trying to gauge the time of the things that you did.

(Testimony of Lester L. Smith.)

A. I realize that, Mr. Wood.

Q. What did you do when you got down in the hold?

A. What did I do when I got down in the hold? I investigated to find out where the rung was, and then I prepared this plywood, as I was saying.

Q. But before you went down in the hold at all you had already [85] spent some time up on deck burning off an end—— A. No, I didn't.

Q. Who did?

you had already [85] spent some time up on deck

Q. You didn't stay there on deck while they did that?

A. No, sir; I didn't stay there at all.

Q. You just told them to do it?

A. I did tell them to get the rung ready.

Q. You spoke of burning off the end of something up on the deck.

A. Not myself personally.

Q. You had them do it?

A. I had them do it. I went down and measured the length of the rung and called it up to them on deck.

Q. All right. You measured the length, then. Then you looked around and procured the plywood boards, did you?

A. The plywood was down there.

Q. Then did you erect the barrier?

A. Yes, sir.

Q. Yourself? A. Yes.

Q. Or with the help of the other two men?

(Testimony of Lester L. Smith.)

A. No, by myself, before they got down there.

Q. How big were these boards?

A. 4 by 4, approximately. [86]

Q. 4 by 4? A. Approximately.

Q. How thick were they?

A. Approximately three-quarters of an inch.

Q. How many of them did you use?

A. Three.

Q. One on the starboard side and two on the port side up the ladder? A. That is right.

Q. What? A. That is right.

Q. So you fixed them up. Do you know how long it took you to do that?

A. I had them fixed up before the welder got his weld lead down there.

Q. Then you got this carton fixed up on the port side, too, didn't you?

A. Well, this carton was right in the area where I was working.

Q. Then, having got that fixed up, did the other two welders come down into the hold?

A. Larson was the first man down there with the stinger. Riley is the man that cut the rung off up on top and let it down.

Q. But they were both down there when the fire broke out? [87]

A. They were both down in the hold at the time of the fire. Riley actually hadn't got up to the ladder yet. He was back in the square of the hatch.

Q. Which one handled the welding machine and struck the arc? A. Mr. Larson.

(Testimony of Lester L. Smith.)

Q. When Larson struck the arc the sparks flew?

A. The sparks flew.

Q. What? A. The sparks fell down, yes.

Q. Fell down? A. Yes.

Q. Did I understand you to say there was a flash fire at once?

A. When I looked at it, yes, it traveled—I don't say like gasoline would go——

Q. Over what extent?

A. Well, it was back in there eight or ten feet in the bales.

Q. It just flashed back? A. Yes.

Q. Then did you reach for the can of water?

A. The can of water was there.

Q. Then did you begin to pour the water on?

A. Yes, sir.

Q. All of it? A. Yes, sir.

Q. You just doused it as fast as you could? [88]

A. Yes.

Q. And it had no effect?

A. No. It did in the particular area, yes.

Q. But the fire had got beyond that area, had it?

A. That is right. It was back in between the bales. There was other cargo on top of it.

Q. How long do you think it took, say after 6:00 o'clock, before the fire broke out? Was it ten minutes? A. I couldn't state.

Q. All right.

A. No, I don't think it was ten minutes.

The Court: Would you say it was after 6:00?

A. It was after 6:00, yes.

(Testimony of Lester L. Smith.)

Q. (By Mr. Wood): When you placed these walking boards there, was there any gap between them?

A. No, not to my knowledge. In fact, as a safety precaution—there was no gap between them, but in case that it falls down on the steel deck, which was good and flat—I did put another board along the edge of that as an extra precaution to catch any sparks.

Mr. Wood: May I see the diagram that is attached to the Coast Guard exhibits?

Q. Mr. Smith, I am going to show you this Exhibit 23 and ask you if that is a duplicate of the sketch you made for the Coast Guard. Here is another one. Your name is on that one. [89]

A. I don't know what this is supposed to show. I don't know what this is supposed to show.

Q. Do you remember making that sketch?

A. No, but it is my writing. I will tell you that. I don't remember making the sketch.

Q. You recognize it, do you?

A. It is my writing.

Mr. Wood: I would like the Court to follow this.

Q. Can you point there to the walking boards?

A. This here is a walking board. This was a walking board, and here is a walking board, and here is one.

Q. You had one walking board on the starboard side and two on the port side?

(Testimony of Lester L. Smith.)

A. That is right.

Q. That is, one athwartship and a second one fore and aft? A. Fore and aft, yes.

Q. Was there a space there between the two walking boards? There must have been.

A. No.

Q. It shows here that there was.

A. Where does it show?

Q. Here (indicating).

A. No. This must have been the center-line column, Mr. Wood.

Q. How about things rolling underneath there?

A. That is what I am talking about, these other little [90] boards that are down here.

Q. You put another board athwartships at the base of the walking boards? A. That is right.

Q. But, nevertheless, the sparks rolled underneath? A. They got under, yes.

Mr. Wood: I think that is all, your Honor.

The Witness: That is not an unusual thing, for sparks to fall like that in that type of welding, your Honor, no.

The Court: It is a rather common thing, is it not?

A. Well, yes.

The Court: That is all.

Mr. Krause: Just a moment. I would like to see Exhibit 7-A, please, once more.

Mr. Wood: I would like to ask the witness one more question, your Honor.

The Court: You may.

(Testimony of Lester L. Smith.)

Q. (By Mr. Wood): Mr. Smith, could it have been possible that some of these sparks flew over the board?

A. No, I don't see—it wasn't possible. I wouldn't say it wasn't possible, but I was watching and they didn't.

Q. The rung that you were welding was several feet above the deck, wasn't it?

A. It was approximately, I would say—I was trying to think of that myself. I will stand corrected on it, but I was thinking [91] myself just what the height of that rung was, and I think it was the third rung from the bottom, which would put it below——

Q. I think you testified at the Coast Guard hearing, as I remember it, it was the third or fourth rung and was about breast-high. I think you testified that way. Did you?

A. I don't remember just what I testified.

Q. Was it about breast-high on you?

A. I am trying to remember today whether it was the third rung or not. That would show in the specifications. They would tell you that, I mean if you get a copy of Albina's specifications.

Q. Assuming it was the third rung, how high up would it be?

A. Well, there are 12-inch spaces.

Q. That would be 36 inches high?

A. That is right.

Q. Then the rung you were welding would be nearly to the top of the walking board, wouldn't it?

(Testimony of Lester L. Smith.)

A. Your walking board was back behind it, also.

Q. Yes, and the walking board was four feet high above the deck, wasn't it?

A. That is right.

Q. And the rung you were welding was about three feet high above the deck, wasn't it?

A. Well, now, approximately.

Q. So there was only one foot—— [92]

A. Another thing——

Q. It would only take one foot of jump for the sparks to go over the walking board?

A. That is right, but we was cutting it off the bosom of an angle iron, too, if you understand.

Q. No, I don't.

A. You know what a vertical angle would look like. I was cutting it off the side there. There was a possibility of it going over the top; yes, sir.

Mr. Wood: That is all.

Mr. Krause: I have nothing further.

Mr. Gearin: I have something further, if I may. I wonder if Mrs. Mundorff would hand the witness Exhibit No. 1, being the testimony given before the Coast Guard.

Would you look, sir, at Page 23 of that transcript.

The Court: This is the witness' testimony before the Coast Guard?

Mr. Gearin: Yes, sir.

Q. Now, Mr. Smith, you stated that just a little bit of the fuzz, or whatever it was, on the burlap

(Testimony of Lester L. Smith.)

was burning and if you had gotten water you could have put the fire out.

A. Just a little bit.

Q. Tell us how much was burning there when you first saw it.

A. Well, as I say, all it was was fuzz on the burlap; yes, sir. [93]

Q. Fuzz on the burlap. Do you recall testifying before the Coast Guard in response to a question asked you by the Hearing Officer was follows:

"Q. Oh, you mean you climbed up on deck to get a fire hose just because the spark went under the bulkhead?

"A. Oh, no, sir; it was starting to go. I mean there is no stopping that piece of hemp once it starts burning."

Did you so testify, Mr. Smith? You can check that page. A. Evidently I did.

Mr. Gearin: I have nothing further, your Honor.

Mr. Krause: What page number was that?

Mr. Gearin: Page 23.

The Witness: Is that my testimony here? Down below I know it isn't here.

Mr. Gearin: Did you find the question and answer on Page 23?

A. Yes, sir. But how about just below this question, it says, "Who is 'they'?" "Mr. Smith and Mr. Larson" is the answer. That can't be my testimony on that page.

Mr. Gearin: On Page 23? A. Yes, sir.

(Testimony of Lester L. Smith.)

Mr. Gearin: May I approach the witness, your Honor? [94]

The Witness: I think you will find this is Mr. Riley, isn't it?

Mr. Gearin: I don't know, your Honor. This is an official copy. I don't know what the witness refers to. Perhaps Mr. Krause can help us on that, or Mr. Wood.

Excuse me, your Honor. Mr. Wagner calls my attention to the fact that I was referring to the testimony of Mr. Riley on Page 23, and I apologize to the Court and Mr. Smith.

The Court: All right. The examination will be stricken and the witness will be exonerated of all answers in connection with that.

Mr. Gearin: I am sorry, your Honor. It was an oversight on my part.

Mr. Krause: I think that is all.

The Court: I think I have a question, now. How far would you say it was from the point of where the arc was struck to the particular piece of metal to where the fire first started, or where you noticed that it first started?

A. Well, as I say, this dropped down to the deck.

The Court: Then that would be about three feet?

A. Down to the deck, yes.

The Court: Down to the deck. Then it started directly underneath?

A. It rolled under these boards—not directly underneath there, but the sparks got under the

(Testimony of Lester L. Smith.)

boards and to the cargo [95] that was behind these boards, behind this barricade.

The Court: Then how far away was it started? Would you say it started from directly underneath the rung?

A. Probably two feet, something like that, or two and a half feet. There was cargo directly behind.

The Court: Then when you put these cartons up there you knew there was burlap within two or two and a half feet of the particular ladder?

A. Yes. I knew the cargo was there. I don't say that I especially noticed the burlap.

The Court: You knew——

A. I knew there was sacks there; yes, sir.

The Court: That is all.

(Witness excused.) [96]

LEO RILEY

was produced as a witness in behalf of the Respondent Albina Engine & Machine Works and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Krause:

Q. What is your first name, Mr. Riley?

A. Leo.

Q. Where do you live? A. Portland.

Q. How long have you lived in Portland?

(Testimony of Leo Riley.)

A. Since 1939.

Q. Whom are you employed by now?

A. Northwest Marine Iron.

Q. In what capacity?

A. As a welder leadman.

Q. A welder leadman? A. Yes, sir.

Q. On April 2nd, 1958, whom were you working for? A. Albina Engine & Machine Works.

Q. Were you employed on the Robert Luckenbach? A. Yes, sir.

Q. At that time you were working on the night crew, were you not? A. Yes, sir.

Q. About what time did you get down to the Luckenbach dock? [97]

A. Oh, it was shortly before 6:00.

Q. At what hour were you supposed to commence work? A. We come in at 4:30.

Q. Where did you report for work?

A. I reported for work at the Albina Yard.

Q. And then you were dispatched over to the Luckenbach ship? A. Yes, sir.

Q. About what time did you arrive there?

A. Shortly before 6:00.

Q. And what did you do?

A. Well, we pulled the welding machine over next to the boat on the dock.

Q. Next to the No. 5 hatch?

A. Yes, sir; and got the welding leads aboard the ship.

Q. Those are wires that you take over?

(Testimony of Leo Riley.)

A. Yes, sir; copper wires from the machine.

Q. What else did you do?

A. Oh, Mr. Smith had called up a measurement as to the length of the rung, and I cut it on the deck before the repairs—prior to going down in the hold to put it in the ladder.

Q. You had your welding lead or the stinger up there on deck?

A. Well, it wasn't a stinger that we cut the stock with for the rung. It was a burning torch.

Q. A burning torch. What sort of fuel does that torch use?

A. It uses a combination of acetylene and [98] oxygen.

Q. Does a welding iron also use the same fuel?

A. No; it uses electricity.

Q. That is electric. Now, you cut this rod to the proper length? A. Yes, sir.

Q. Did you then have to lower the stinger down into the hold?

A. We lowered the welding leads down into the hold.

Q. The welding leads. What about the tool with which the welding is done?

A. That is the welding lead, sir, or stinger, as it would be called.

Q. Who was there with you besides Smith?

A. Mr. Larson.

Q. Now, I suppose that was after 6:00 o'clock when you got down into the hold?

A. Yes, sir; it was.

(Testimony of Leo Riley.)

Q. Do you recall in what order you had gone down?

A. Smith had gone down first. I don't recall who went down next.

Q. But you and Larson both got down there?

A. Yes, sir.

Q. Who held the welding lead?

A. Mr. Larson.

Q. He was doing that. Just tell us what happened.

A. Well, we seen that the bar that I had cut off was not going [99] to fit. There was a little kind of bump on the weld of the angle iron, so we were going to have Mr. Larson knock off this little bump on the old rod, the old weld, so that the bar would fit in place.

Q. Did he knock it off?

A. Well, I reckon he did.

Q. What happened?

A. Immediately Mr. Smith asked him to stop. He had just barely struck the arc, and Mr. Smith had evidently seen a spark drop that he wanted to investigate or some such.

Q. Go ahead. Tell us what happened. What did you do?

A. Well, they pulled the barricade out from in back of the ladder and threw what water they had in the can against the fire.

Q. Did you see fire there in the cargo?

A. I didn't see the fire. I seen the smoke.

Q. Who threw the water on it?

(Testimony of Leo Riley.)

A. Mr. Smith.

Q. Did you do anything about trying to extinguish it then?

A. Well, at that time there was a lot of things going on, and Mr. Smith said that there was a fire, and I started immediately up the ladder to get the fire hose.

Q. Keep on going and tell us what you did.

A. Well, Mr. Smith was coming up the ladder behind me, and we got the fire hose into the hold, down to Mr. Larson, and then [100] I opened the valve on the fire line. That is about all I did.

Q. Did you get any water in the hose?

A. Not a bit.

Q. What did you do after that? Did you see where Smith went?

A. He headed towards the house on the ship.

Q. The amidship house? A. Yes, sir.

Q. Is that the direction to go if you want to go down into the engine room?

A. It is the only way to get down in there.

Q. In the meantime where did you remain?

A. I remained standing at the top of the hatch where I could see down to Mr. Larson.

Q. Where you could see down? A. Yes.

Q. Could you see Larson down there?

A. Yes, sir; I could.

Q. What was the condition of the fire?

A. Well, I could see an awful lot of smoke. I couldn't see any flames.

(Testimony of Leo Riley.)

Q. Did you see Smith come back several times after that?

A. Yes, sir. It seems like he was gone and back before he was gone.

Q. You didn't get any water in that hose anyway? A. No; we didn't. [101]

Q. Can you just give us your best estimate as to how much time went by before you came up on deck and lowered the hose down into the hatch? How long was that after you first saw the smoke in the burlap?

A. Oh, I would say two minutes.

Q. By the time Smith came back the third time or the second time—he made three trips over toward the amidship house—how much time had gone by by that time?

A. Oh, I would say perhaps six minutes or five minutes.

Q. Was Larson still down in the hold then?

A. Yes, sir; he was.

Q. How much longer did he remain down there? Do you know the circumstances of his coming out?

A. Well, I heard someone holler at him to come up.

Q. You don't know who that was?

A. No; I don't know who that was.

Q. Now, if you had gotten water into that hose —at the time you had lowered it down to Larson and after Mr. Smith had gone down or headed in the direction of the engine room and returned again, what was the state of the fire at that time?

(Testimony of Leo Riley.)

A. Well, as to fire I don't know.

Q. You couldn't see any fire?

A. I couldn't see any fire.

Q. How big was the blaze, judging from the smoke that you had there? [102]

A. Well, I don't know. We could see a lot of smoke, but I couldn't see any blaze.

Q. Do you have any idea as to whether you could have put the fire out if you had gotten water down there by that time?

Mr. Wood: I think I will object to that. He can state the facts.

The Court: I will ask a question. Can you express an opinion or do you have any experience with this type of thing so that you could express an opinion as to whether the fire might have been put out or not at that time?

A. No.

The Court: You just have no experience along that line?

A. No.

The Court: Objection sustained.

Q. (By Mr. Krause): What sized hose was it that had been lowered down to Larson?

A. 2½-inch fire hose.

Q. Can you give us an idea about how long it was before the Fire Department got water onto the fire after it had started?

A. Well, it seemed like an awfully long time.

Q. Of course, what we want is your estimate of time; not how long it seemed, Mr. Riley.

(Testimony of Leo Riley.)

A. Well, I would say ten or fifteen minutes.

Q. Had Larson come out of the hold before the Fire Department arrived? [103]

A. Yes, sir; he had.

Q. Up to the time that he came out were you still able to see him down there; that is, was the smoke so dense that you couldn't see him standing down in the hold?

A. Well, I don't think it was, but I can't recall exactly as to whether I could still see him or not.

Mr. Krause: You may cross-examine.

Cross-Examination

By Mr. Wood:

Q. Mr. Riley, it was Larson, wasn't it, who was the one that burned off this nubbin of angle iron?

A. Yes, sir; it was.

Q. Because he was the welder? A. Yes.

Q. What do they call you? What were you?

A. I was a ship fitter on this particular job.

Q. What was your particular duty in this three-man job?

A. Well, my particular duty was to cut the bar of steel and fit it to the ladder.

Q. And Larson was then to weld it?

A. Yes, sir.

Q. How far away were you standing from Larson when he struck the arc that burned the metal?

A. Oh, I can't say. [104]

Q. Were you close to him or quite a ways off?

(Testimony of Leo Riley.)

A. Oh, I was back a ways.

Q. This nubbin of metal was at least three feet up above the deck, wasn't it? A. Yes, sir.

Q. And the walking board was only about four feet high from the deck, wasn't it? A. Yes.

Q. Isn't it possible some of the sparks flew over that walking board?

A. Well, I couldn't say. Sparks will fly every direction. It is possible.

Q. This is cross-examination, and I think I have the right to say that there is one witness who testified he saw the sparks fly over the walking board. Do you have any comment to make on that?

A. No; I don't, sir.

Q. When you talk about going up and down the ladder into the hold, and up again and back and forth, which ladder did you men use?

A. We used the after ladder.

Q. That is what I thought. You used the after ladder all the time? A. Yes, sir.

Q. Going up and back and forth? [105]

A. Yes, sir.

Q. That is about 40 feet away from the forward ladder, isn't it?

A. No; it isn't that far.

Mr. Wood: All right. That is all.

(Testimony of Leo Riley.)

Cross-Examination

By Mr. Gearin:

Q. Mr. Riley, I take it that you at no time saw any flames? You just saw the smoke?

A. Not as I recall, any flame.

Q. Now, through the courtesy of Mrs. Mundorff, I am going to ask that you be given the transcript of testimony, our Exhibit No. 1. Do you recall testifying before the Coast Guard?

A. Yes, sir; I do.

Q. Would you turn to Page 23, Mr. Riley? Do you have Page 23 there? A. Yes, sir.

Q. I am going to ask you if you testified as follows under oath at the Coast Guard hearing that was conducted by the investigating officer, as follows:

"Q. You mean you climbed up on deck to get a fire hose just because the spark went under the bulkhead?

"A. Oh, no, sir; it was starting to go. I [106] mean there is no stopping that piece of hemp once it starts burning.

"Q. It started to flame instantly, did it?

"A. Yes, sir."

Did you so testify?

A. Well, it is written down there. I must have done so.

Q. Now, the rung on the forward ladder that was out was about the fifth rung up from the deck, was it not? A. Well, now——

(Testimony of Leo Riley.)

Q. Do you remember now just which one it was?

A. I do not, no.

Q. How far was the cargo piled from the ladder where you were working?

A. The cargo forward of the ladder or aft of the ladder, sir?

Q. How close to the ladder was the nearest cargo?

A. Oh, I would say the closest cargo was forward about—about two and a half feet forward of the ladder.

Q. That is your memory at this time?

A. Yes, sir.

Q. You can't tell us whether sparks went over the top of or underneath the plywood shield?

A. No; I couldn't.

Q. I understand that when you strike an arc unless you have your hood on you shouldn't look that way?

A. It is kind of hard on the eyes if you do. [107]

Q. It is not a matter of fact that you usually have a CO2 extinguisher with you when you weld on metals?

A. Well, at times, yes, and other times——

Q. Is it not the general practice of Albina to have a fire extinguisher or water when welding in holds? I will ask that question directly.

A. It is now, but it wasn't at that time.

Q. Had your immediate supervisor ever given you instructions to have a fire extinguisher handy when welding? A. No, sir.

(Testimony of Leo Riley.)

Mr. Gearin: May I approach the witness, your Honor?

The Court: Yes.

Q. (By Mr. Gearin): Do you recall this testimony on Page 28? And this testimony was soon after the fire, Mr. Riley. This was April 3rd, 1958, the day after the fire. Do you recall that?

A. Yes, sir; I think so.

Q. Do you recall being asked this question by Lieutenant Commander Mason of the United States Coast Guard:

"Q. Have you ever been given any specific instructions by your employers relative to what you will do and what you will not do with regard to safety against fire?

"A. Well, they ask us to have a fire extinguisher; that's about all. [108]

"Q. They ask you to have a fire extinguisher?

"A. Yes, sir.

"Q. Or did they direct that you shall have a fire extinguisher?

"A. Well, we should have one, yes."

Did you so testify? A. I guess I did.

Q. And a further question:

"Q. Did you get these instructions with regards to having a fire extinguisher verbally, or is there something in writing that you know of?

"A. Not that I know of.

"Q. I see. Strictly verbal instructions furnished all welders?

(Testimony of Leo Riley.)

"A. Well, it is for everybody working on the waterfront, yes."

Did you so testify? A. Yes.

Q. And also the third question on the top of that page:

"Q. Now, when you go out on these particular welding jobs, is it a—is there any form of general practice that you conform to for safety's sake, when you have to weld in cargo holds?

"A. Well, we usually have a fire extinguisher or water in the holds." [109]

Did you so testify?

A. Yes, sir; I guess I did.

Mr. Gearin: Now, may I ask that Mrs. Mundorff mark this as Exhibit 7-B, please?

(A handwritten statement of Leo C. Riley was marked by the Clerk as Libelants' Exhibit 7-B for identification.)

Q. (By Mr. Gearin): Mr. Riley, I am handing you—may I ask you first if you live at 2051 Southeast 141st Avenue? A. Yes, sir.

Q. Did you live there on April 28th, 1958?

A. Yes, sir.

Q. Do you recall on April 28th, 1958, you gave a written statement to a Mr. Forrest Johnson, representing our office?

A. I don't recall the date, but I do remember there was a man out there.

Q. Now, on these two pages of this document there appears at the bottom, "Read and found

(Testimony of Leo Riley.)

O.K., Leo C. Riley." Is that your signature and is that your handwriting? A. Yes, sir.

Q. Did you read that statement before you signed it? A. Yes, sir.

Q. I call your attention to this portion of the statement:

"There was a rung out of the forward ladder about the fifth rung up from the deck." [110]

Now, did I read that correctly from your statement? A. You did, sir.

Q. Does that refresh your memory at this time?

A. No; it doesn't.

Q. Do I read this correctly from the statement:

"The sparks then flew under the cargo which was piled about one foot to one and one-half feet away from the ladder we were working on."

Did I read that correctly from the statement?

A. Yes, sir.

Q. Does this also appear in your statement:

"We usually have a CO2 extinguisher with us but did not have one that particular night."

A. That is right.

Q. What is the fact now about whether or not you usually have a CO2 extinguisher with you?

A. We do, yes.

Mr. Gearin: We offer Exhibit 7-B into evidence for the purpose of impeachment.

Mr. Krause: Are you through with the witness?

Mr. Gearin: Yes, sir.

(Testimony of Leo Riley.)

Redirect Examination

By Mr. Krause:

Q. Mr. Riley, I am a bit confused about your testimony. Your [111] last answer, I believe, was that you now do take a fire extinguisher with you when you go into the hold to do some welding?

A. Yes, sir.

Q. Did you do that before; that is, prior to the fire on April 2nd, 1958? What is your best recollection on it?

A. I don't believe that we did, no.

Q. Did you either take a fire extinguisher or water with you when you went into the hold prior to April 2, 1958, to do any welding where there was cargo in the hold?

A. Well, prior to that time I hadn't done any welding in a hold where there was any cargo.

Q. With respect to the instructions as to what you should take down with you, what is your best recollection now—well, if you had not had occasion prior to this fire to weld in a hold where there was cargo, did you ever receive any instructions about what to take down with you when you were going to weld in a hold that had cargo in it?

The Court: I think I can answer that, Mr. Krause. If he never welded in a hold or didn't go down in a hold to do so, I don't think that there would be anything to that. Of course, if you want the witness to answer——

(Testimony of Leo Riley.)

Mr. Krause: It doesn't seem to me to be awfully important, but he seems to have contradicted himself between the Coast Guard and the statement that was given and his testimony here, [112] for that matter.

Q. Do you recall ever receiving any instructions at all as to what men going into a hold where there was cargo should do with respect to having fire-prevention facilities with them? That is, prior to the fire on April 2nd, 1958?

A. I just can't recall.

Q. Now, you continued to work for Albina for some time after April 2nd, 1958, did you?

A. Yes, sir.

Q. For about how long?

A. Oh, perhaps a year and five months, or something like that. I don't know. I have been jumping around.

Q. Have you since this fire on April 2nd welded in a hold where there was flammable cargo in it on any occasion? A. No, sir; I haven't.

Q. Then on April 2nd is the only time you did weld when there was flammable cargo in the hold?

A. As nearly as I can recall, yes.

Q. Usually the holds are clear when you weld in them? A. Yes, sir.

Mr. Krause: I think that is all.

(Testimony of Leo Riley.)

Recross-Examination

By Mr. Gearin:

Q. Mr. Riley, the fire occurred on April 2nd, 1958, did it [113] not? A. Yes, sir.

Q. Did you work at all from the time that the fire started—did you do any further work at Albina between the time the fire started and the time that you testified before the Coast Guard?

A. Yes, sir; I did.

Q. Was that the period of time, between April 2nd and April 3rd, that you received your instructions about what to take in the hold with you when you welded? A. I can't recall.

Q. But you don't deny that you gave that testimony at the Coast Guard hearing?

A. I can't deny that, sir.

Mr. Gearin: I have nothing further, sir. May I ask whether or not Exhibit 7-B is being received or if there is any objection?

Mr. Krause: No; I have no objection.

The Court: Admitted.

(The handwritten statement referred to was received in evidence as Libelants' Exhibit 7-B.)

2051 S.E. 141st. Ave.
Portland, Oregon.

April 28, 1958.

My full name is Leo C. Riley.
I reside at the above address.
I am a welder & work out of the Boilermakers local # 72, S.W. 3rd. & Clay St. Portland, Or.
On April 7, 1958 between 6:00 A.M. & 7:00 A.M.
I was a member of the welding crew that was working in the lower hold #5 of the S.S. Robert Luckenbach which was tied up at the Luckenbach dock in Portland.
Mr. Larson was the welder. I was the fitter.
Mr. Smith was the foreman.
There was a ring at of the forward ladder - about the fifth ring up from the deck.
There was a little piece of weld left from the old weld that had held the ring.
Our equipment was all electric.
Mr. Larson struck an arc to burn off & weld off this little bit of old weld. A spark flew off & went to the floor & got underneath the piece of Plywood that was blocked up there which we were using as a shield. The sparks then flew under the cargo which was piled about 1 foot to 1½ feet away from the ladder we were working on.
One piece of plywood was between the ladder & the cargo. This piece of plywood was 4' x 6' & had been used by the longshoremen in loading cargo.
It happened so quick & I usually turn my face away when an arc is struck so I can't tell if the sparks went over the top of or underneath the plywood shield. We stopped work at once because we could see smoke at once. We threw a bucket of water on it but the fire was underneath the cargo

Read and Signed by Leo C. Riley

& we couldn't get to it. It happened just as we were starting to do this job.

We saw we couldn't get it out. I made a dash up the ladder to the main deck to get a fire hose. The nearest one was on the main deck near hold #5. Mr. Smith ran to the engine room to ask them for pressure. We lowered the hose down. Mr. Brown stayed in the hold & he grabbed the hose when I lowered it to him. I turned on the valve on the main deck But we got no water. I learned later that a section of pipe was cut down in the engine room & that is why we could get no pressure.

Since there was nothing else we could do we waited for the Fire Dept. & they arrived in a short time. I stayed for about one hour after the fire Dept. got there & they were still fighting the fire when I left.

There was no fire extinguisher or hose handy in the hold. The nearest hose was up on the main deck & that had no water as explained above.

Usually we have where water hoses are located on ships & can get water if something catches on fire. We usually have a C.O.2 extinguisher with us But did not have one that particular night. It would not have done any good that night anyway because the fire was underneath the cargo & in a place hard to get at.

Mr. Smith, Mr. Brown & myself are all employees of Obrien Engine & Machine Works.

There were just the 3 of us in the hold at the time.

The cargo was general cargo. There was burlap & hemp so I was told. It is usually wrapped up & you can't see what it was. Read and Signed By
Leo C. Riley

(Testimony of Leo Riley.)

Redirect Examination

By Mr. Krause:

Q. The fire occurred on the evening of April 2nd, 1958, didn't [114] it? A. Yes, sir.

Q. And you testified the next morning before the Coast Guard, didn't you? A. Yes.

Q. Was there any chance for you to work between those two times?

A. At Swan Island; yes, sir.

Q. You did work at Swan Island. After the fire started on the Luckenbach vessel you went back to Swan Island? A. Yes, sir.

Q. And you worked there until about midnight?

A. Yes, sir; 12:30.

Q. Then you went home? A. Yes.

Q. Did you go back to work the next day before testifying at the Coast Guard hearing?

A. No, sir; I didn't.

Mr. Krause: I think that is all.

(Witness excused.) [115]

LEONARD LARSON

was produced as a witness in behalf of the Respondent Albina Engine & Machine Works and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Krause:

Q. Leonard Larson is your name?

A. That is right.

(Testimony of Leonard Larson.)

Q. Where do you live, Mr. Larson?

A. I live at 9306 Northeast Seventh, Vancouver, Washington.

Q. How long have you lived here in Oregon and Washington? A. About eighteen years.

Q. You work for Albina?

A. That is right.

Q. You are still working for them?

A. Yes; I still work for them.

Q. You were working for them on April 2nd, 1958? A. That is right.

Q. In what capacity were you working at that time? A. I was employed as a welder.

Q. Are you still a welder now?

A. Yes; I am.

Q. You do the same kind of work?

A. I do the same kind of work.

Q. Was this fire on the Luckenbach the only fire that you have ever participated in on [116] shipboard? A. That is the only one, yes.

Q. You have never been in one before or afterwards? A. Never have been, no.

Q. I suppose you got down to the ship around 6:00 o'clock? A. About that time; yes, sir.

Q. Did you go down with Riley or Smith?

A. Yes; I went down with—I was working at the Albina shipyard. I was dispatched there to the Luckenbach Dock.

Q. Did you and Riley go down together?

A. Yes, yes.

Q. When you got there was Smith already

(Testimony of Leonard Larson.)

there? A. Smith was there, yes.

Q. The Albina Engine & Machine Works is only a couple of blocks away from the Luckenbach Dock, isn't it? A. Not very far, no.

Q. Is it more than a couple of blocks?

A. Yes; a little bit more.

Q. When you got there I suppose you helped them get the welding machine over alongside the No. 5 hatch? A. Yes.

Q. Then you went on the ship. Did you see Riley cut the rung for the ladder?

A. No. The first thing I did was attach the ground lead onto the ship, put the ground lead on board the ship.

Q. You attached it. He couldn't cut this bar until you had [117] done that, could he?

A. No. He done the cutting. I was taking care of the welding part of it.

Q. Then he did the cutting? A. Yes.

Q. Then all three of you went down in the No. 5 hatch? A. That is right.

Q. When you got there will you just describe generally what the conditions were around this forward ladder?

A. Smith built a fire protection around it.

Q. What did he use to do that?

A. He used plywood boards, as far as I could see.

Q. Between the cargo that was close to the ladder and the ladder there were plywood boards?

(Testimony of Leonard Larson.)

A. Plywood, yes.

Q. What are those boards used for on the ship usually, do you know?

A. Well, they are used for putting up cargo, I guess.

Q. They are called walking boards, aren't they?

A. Yes.

Q. Do they use them for walking on cargo, the longshoremen? A. I suppose they are, yes.

Q. Did you see what kind of cargo there was just beyond that barricade?

A. Yes; I did. [118]

Q. What kind of cargo was it?

A. It looked like it was burlap.

Q. Was it in sacks? A. Baled.

Q. Burlap in bales? A. Yes.

Q. Did it look like new or old burlap?

A. Well, I don't remember. It didn't look like new burlap, I don't think.

Q. Now, were you handling the welding rod?

A. Yes.

Q. And did you attempt to burn off this old welding material that was stuck on the ladder?

A. That is right, yes.

Q. Just tell us how you do that; that is, what did you do?

A. Well, I put the rod in my stinger, and Lester Smith told me to strike the arc and burn the burr off so he could stick the rung in there. I just got started and he hollered to hold it, and I stopped. There was a little fire going in the burlap.

(Testimony of Leonard Larson.)

Q. When you started? A. Yes.

Q. You struck your arc, didn't you?

A. Yes.

Q. And then did you put it onto this gob of welding material? A. Yes. [119]

Q. Did any of the material fall down onto the floor? A. Apparently it did, yes.

Q. Did you notice it fall down?

A. Well, you can't see through your hood, no.

Q. You had a hood on? A. Yes.

Q. Then you are looking through some glass at the work that you are doing? A. Yes.

Q. Was that hood fixed in such a way that you could easily remove it from in front of your face?

A. Oh, yes; yes.

Q. You just keep it on and shove it upward, do you? A. Yes.

Q. So you can see out from under it?

A. Yes.

Q. After Smith told you to quit your welding or burning, did you?

A. Yes; we stopped, and then there was a little fire going, and they grabbed a water can there and threw water on it to stop it, but we couldn't get at it.

Q. You say you saw fire? A. Yes.

Q. Where was the fire?

A. The fire was in the burlap, way underneath the burlap.

Q. The water was thrown on there and that didn't put it out? [120]

(Testimony of Leonard Larson.)

A. No; it didn't put it out.

Q. And you tried to stomp it out?

A. I tried to stomp it out.

Q. It kept on burning in between the bales?

A. Yes.

Q. You remained down in the hold for awhile, did you?

A. Yes; I did. They immediately left and——

Q. What was that?

A. They immediately left, and Smith told Riley to get the fire line. And they immediately left, and I climbed up on a roll of paper about halfway in the middle of the hatch, of the hold, and was holding the hose waiting for the water to come.

Q. You were holding the hose then; is that right? A. Yes; that is right.

Q. You got no water while you were down there?

A. No, I got no water.

Q. Can you give us an idea about how long you were there holding the hose waiting for the water to come before you finally came up?

A. I got out of there, I figured, in about six minutes.

Q. Tell us what had been done in that time?

A. Well, I went down in the hold. I couldn't tell what was being done. They were on topside and I was waiting for the water, and I couldn't tell exactly what to do.

Q. What was the condition of the area where the fire was? [121]

A. That was burlap, and the smoke was getting

(Testimony of Leonard Larson.)

heavier, the burlap was burning heavy—started to burn heavy.

Q. You were about in the middle of the hatch on a roll of paper?

A. Yes; on a roll of paper.

Q. Did the smoke reach over to where you were?

A. Well, it didn't get too bad. It come out of the—come up from under the hatch and out through the forward end of the hatch.

Q. Went up through the hatch opening up above? A. Yes.

Q. You think you remained down there about six minutes? A. Yes, I think so.

Q. By that time had the Fire Department arrived?

A. Well, when I got up out of the hold the Fire Department was just unrolling their hose.

Q. They had just arrived? A. Yes.

Q. And were running some hose out?

A. Running the hose out.

Q. Do you know what you could have done to that fire if you had gotten water down there?

A. I could have put it out.

Mr. Wood: I object on the ground of competency, your Honor. [122]

The Witness: What?

Mr. Krause: Never mind. He is talking to the Judge.

The Court: How long had you been a welder?

A. I have been a welder for—I started welding in 1931, acetylene welder.

(Testimony of Leonard Larson.)

The Court: During that period of time you have had other little fires start, no doubt?

A. Oh, yes; yes.

The Court: And you have put them out?

A. Oh, yes.

The Court: He may answer.

Q. (By Mr. Krause): You saw how big the fire was there before you came up out of the hold? You could see where it was burning?

A. Yes; I could.

Q. You could see how big the blaze was?

A. Yes.

Q. If you had gotten water through that hose, then, could you have extinguished the fire?

A. I could have, yes. I am sure I could have.

Q. To how big an area was it confined at that time?

A. Oh, I would say an area about the size of that desk there.

Q. Which desk? A. This one here.

Q. The one at which Mrs. Mundorff is [123] sitting? A. That is right.

Q. Those were bales of burlap?

A. Bales of burlap.

Q. Had the fire gotten hot enough to do any damage to the steel of the vessel at that time?

A. No, no.

Q. Was there any of the paper cargo involved at that time?

A. No; there was nothing in the paper cargo; no.

Q. Now, with the fire as you have described it

(Testimony of Leonard Larson.)

in among the bales—have you had occasion to use CO2 extinguishers?

A. Do I know how to use a CO2?

Q. Yes. A. Oh, yes.

Q. You have used them? A. Oh, yes.

Q. Would that have been of any effect against the fire in among the bales of burlap?

A. I don't think so. I don't think a CO2 would have helped us any.

Q. A stream of water from a 2½-inch hose, would that have done any good?

A. That would have done it, yes.

Q. With respect to the blaze in among the bales where you noticed the fire, was it down near the deck or up above the deck? [124]

A. I don't understand you, sir.

Q. Where was the fire with respect to the deck; that is, in these bales of sacks? Where was the fire? Was it down close to the deck or up high?

A. It started underneath, started close to the deck, yes.

Q. Started quite close to the deck?

A. Yes; the tank tops.

Q. Would you say about how many minutes it was from the time the fire started until the first water was poured onto the fire by the Fire Department?

A. How many minutes? I would say it was, oh, ten minutes, anyway, before the firemen started——

Q. Before the first water went in?

A. Yes.

Mr. Krause: You may cross-examine.

(Testimony of Leonard Larson.)

Cross-Examination

By Mr. Gearin:

Q. Mr. Larson, have you ever had occasion to use a CO2 fire extinguisher on a fire in burlap?

A. No; I never did; no.

Q. You don't know whether or not a CO2 fire extinguisher would have done any good as soon as Mr. Smith announced the fire, do you?

A. Well, if it had got too big a start I don't think it would [125] have helped much.

Q. You mean from the time that Mr. Smith first called out that there was a fire and you threw your hood back the fire was so well started that a CO2 extinguisher would not have done any good?

A. Well, we had a five-gallon can of water, container of water, and it didn't put it out.

Q. Was it five gallons of water?

A. I don't know. Three gallons, or whatever that is.

Q. Now, if you had taken a fire line down in the hold with you, you would have had the fire out, wouldn't you? A. That is right.

Q. You have told us that you have had no experience fighting a burlap fire with CO2?

A. Never did, no.

Q. When you struck this arc were you standing or were you sitting? A. I was standing.

Q. Do you recall testifying before the Coast Guard the day after the fire? A. I do.

(Testimony of Leonard Larson.)

Q. Will you advise us whether or not—maybe I better have the transcript. Would you hand the transcript, which is Exhibit No. 1, to the witness, please? Do you recall, Mr. Larson, being examined by Lieutenant Commander Mason the day after the fire? [126] A. I do.

Q. At the Coast Guard hearing? A. Yes.

Q. Do you recall being asked this question by Lieutenant Commander Mason and giving these answers:

"Q. Are there any instructions that you have ever been issued by your company with respect to maintaining any fire-prevention equipment on hand? A. Yes; there has been; yes.

"Q. What specifically have you been instructed to do?

"A. Either pull out—put out—pull out a fire line or use a CO2 bottle, or something like that.

"Q. In other words, to keep some fire-fighting apparatus on hand in readiness; is that it?

"A. Yes; that's right.

"Q. Are these written instructions or are they verbal? A. Verbal instructions."

Did you so testify? A. Yes; I did.

Mr. Gearin: I have nothing further. Thank you.

The Court: Mr. Wood, do you have anything?

Mr. Wood: A little bit, your Honor.

Mr. Krause: I might say a word about that, your Honor. [127] He had not been asked those questions preliminarily. There is nothing to impeach him on that I can see.

(Testimony of Leonard Larson.)

The Court: It may be true. It has already been answered now, though, Mr. Krause. It is true it may not have been proper cross-examination, but it is in the record and it will stand now, anyway.

Mr. Wood, do you want to proceed?

Mr. Wood: Yes. It will not be very long.

Cross-Examination

By Mr. Wood:

Q. Mr. Larson, I am looking at your Coast Guard testimony—I will show it to you if you want me to—and I notice that you said there that you got your instructions from Smith while you were at the plant at Swan Island between 6:00 and 6:30. Do you recall that? A. I did what?

Q. That while you were at Swan Island at the plant is when Mr. Smith got hold of you and told you about this welding job, and that time was between 6:00 and 6:30. Do you remember testifying like that? A. At Swan Island?

Q. Yes.

A. No. We was at Luckenbach Dock when we got the instructions.

Q. I had better show you this, I guess. [128]

The Court: Do you have any idea what page it is?

Mr. Wood: I will use the original.

The Court: We have a copy of that in evidence, do we not? Make reference to the page number, the exhibit number and the page.

Q. (By Mr. Wood): Mr. Larson, I am not trying

(Testimony of Leonard Larson.)

to trap you. I just want to remind you of what you said. I will ask you if this is what you testified to——

The Court: What page is it, Mr. Wood?

Mr. Wood: It begins at Page 52.

The Court: This is what exhibit number?

Mr. Wood: Exhibit No. 23.

"Q. And how did you first receive the information regarding this job?

"A. From the foreman, Lester Smith.

"Q. And you are a member of some union, are you, Mr. Larson? A. 72—Local 72.

"Q. That is of what, sir?

"A. Boilermakers' Union.

"Q. I see. Is Mr. Smith and Mr. Riley both members of the same union? A. That's right; yes.

"Q. Now, had Mr. Smith given you any specific instructions regarding this particular job, as to any [129] particular time to be aboard?

"A. He contacted me down at the company's plant and told us what he wanted done and what he wanted done on the—he wanted us to pull a—string a lead out to No. 5 hold.

"Q. To string a lead out? A. Yes.

"Q. In other words, a welding lead to No. 5 hold? A. Yes.

"Q. And what else? Anything else?

"A. No; that is all he said at the present.

"Q. Did he give you any particular time as to when to do this? A. To what?

"Q. Any particular time to be aboard to do

(Testimony of Leonard Larson.)

this? A. No; he didn't; no.

"Q. He didn't specify a time? A. No.

"Q. Now, what time was this that he gave you these instructions?

"A. It was, I would say, around 6:00—between 6:00 and 6:30.

"Q. You stated this was while you were down at your plant? A. Yes. [130]

"Q. At Swan Island? A. Yes."

Does that refresh your memory any?

A. We weren't at Swan Island, though. We was at the yard, at Albina Yard.

Q. You said "Yes" here. Then what did you do then?

A. I got my car and went down to Luckenbach Dock.

Q. In your own car? A. Yes.

Q. But the point is whether you were at Swan Island or your yard, did you get these instructions from Smith between 6:00 and 6:30 or an earlier time?

A. We got those instructions from Smith—it was possibly a little before 6:00.

Q. A little before 6:00? A. Yes.

Q. So it is not quite accurate here?

A. No.

Q. There is another thing I wanted to ask you about, please.

Mr. Gearin: Your Honor, for the purpose of the record, the references to the transcript made by Mr. Wood in his exhibit are contained on Pages

(Testimony of Leonard Larson.)

29 and 30 of Exhibit No. 1, the Coast Guard transcript.

The Court: Thank you, Mr. Gearin.

Mr. Gearin: I will say that they appear to be identical. [131]

Q. (By Mr. Wood): I want to ask you this, Mr. Larson: When you were down in the hold there didn't you have some trouble with the welding machine, so that Riley went up out of the hold again to fix the welding machine on the deck, and he had to do something with it before you could make the thing work? Isn't that a fact?

A. I don't remember whether he did or not. I don't remember.

Q. I want to refresh your memory on that, then. The only importance of this is that it illustrates the time that went by. I am going to call your attention to the testimony on Pages 56 and 57.

The Court: This is still Exhibit 23?

Mr. Wood: Yes, your Honor. This is before the Coast Guard.

"Q. Mr. Smith—did he place the other rung in place for you to start welding?

"A. Yes; he did; yes.

"Q. Did he?

"A. The welding machine wasn't working to start with and Riley went out of the hold and then come back down again, and then we started to work."

Do you remember that?

A. Well, I think so, yes.

(Testimony of Leonard Larson.)

Q. Do you know how long that took, that time when the welding machine wouldn't work and somebody had to go fix it? [132]

A. It wouldn't take very long, I don't suppose.

Q. Can you estimate it in minutes, how much time that was?

A. Oh, I would say a couple or three minutes, four minutes or five, somewhere along in there.

Q. You think that from the time the fire started until the time the Fire Department had water was about ten minutes? Is that what you think?

A. Yes.

Q. I only have one more question: How high was the rung on the ladder above the ceiling?

A. It was the third rung up, as I recall. I remember it as being the third rung up.

Q. How high would that be above the ceiling?

A. It would be about three feet up.

Q. So that would be within one foot of the top of the walking boards, wouldn't it? A. Yes.

Q. Isn't it quite possible that some of these sparks, at least, flew over the walking board instead of going underneath?

A. They could have.

Q. You don't know whether they did or not?

A. No; I don't know whether they did or not, because I had my hood on.

Mr. Wood: I think that is all. Thank you.

Mr. Gearin: Nothing further. [133]

Mr. Krause: Nothing further, your Honor.

(Witness excused.)

Mr. Krause: I have one or two additional witnesses, your Honor.

The Court: It is about time for adjournment until tomorrow morning, anyway.

(Whereupon, an adjournment was taken until Thursday, January 7, 1960, at 9:30 a.m.)

January 7, 1960

(Court reconvened, pursuant to adjournment, at 9:30 a.m. and proceedings herein were resumed as follows:)

Mr. Gearin: I have presented to the Clerk, your Honor, the amendments as you requested in the form I dictated into the record yesterday.

The Court: Yes. Mr. Wood and Mr. Krause, are you ready to proceed?

Mr. Krause: Yes, your Honor. I would like to get my opponents here to stipulate for the record that we measured the desk at which Mrs. Mundorff is seated. One of the witnesses described the size of the fire as being the size of that desk.

The Court: That is right.

Mr. Krause: It is eight feet long, 39 inches wide and 40 inches high.

Mr. Gearin: Yes.

Mr. Wood: That is all right, yes. I held one end of the tape.

The Court: The Court will consider those measurements as correct.

Mr. Krause: We will call Mr. Sutherland. [135]

JOHN SUTHERLAND

was produced as a witness in behalf of the Respondent Albina Engine & Machine Works and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Krause:

Q. Your name is John Sutherland?

A. That is right.

Q. How long have you been a resident of Portland? A. Forty-five years.

Q. You are employed by whom?

A. Albina.

Q. What is your official position with Albina Engine & Machine Works?

A. I am Assistant Secretary.

Q. Are you acquainted with Herbert Sterling?

A. Yes.

Q. For how many years have you known him?

A. Probably twelve years.

Q. During that time whom was he employed by?

A. He was employed as the Port Engineer for the Northwest area for Luckenbach Steamship Company.

Q. Where was his principal office?

A. In Seattle.

Q. Did he on occasions come to Portland?

A. Oh, yes. [136]

Q. In connection with company business?

A. Oh, yes.

(Testimony of John Sutherland.)

Q. What type of business did he represent the company on?

A. Well, he handled all their repairs, alterations and other maintenance of their vessels in this area.

Q. Did he have an assistant, too, who worked at that line of work? A. Yes.

Q. What was his name?

A. Well, he has had various assistants. He had Jim Saunders until his death, and just recently he has had George Arway as an assistant.

Q. During this period of time did you do repair work and alteration work on the Luckenbach ships?

A. Yes.

Q. Would you tell us just who authorized that work and how the authorizations were given?

A. Well, normally the work was authorized verbally at the time that the work was put in hand, and then it was later written up in detail and after the work was accomplished it was confirmed by a written order.

Q. By "verbally," do you mean orally?

A. Orally.

Q. Who generally authorized the doing of the work for Luckenbach? [137]

A. Usually it was Herb Sterling or his assistant.

Q. Can you tell us how large those jobs were that were authorized orally by Mr. Sterling?

A. Well, actually there was no limitation. We did hundreds of thousands of dollars worth of work for them on an oral basis.

(Testimony of John Sutherland.)

Q. Were some of those jobs that were orally authorized jobs involving more than $30,000?

A. Oh, yes.

Q. How was the determination made regarding the repairs that were required by the Robert Luckenbach after the fire on April 2nd, 1958?

A. Would you repeat that?

Mr. Krause: Read the question.

(Last question read.)

A. There was a survey made by the owner's representative of the vessel. Our people were present, and the Salvage Association was present; that is, the U. S. Salvage Association, and the Coast Guard and the American Bureau were present.

Mr. Gearin: You mean the American Bureau of Shipping?

A. That is right.

Mr. Krause: May I have the Bailiff hand the witness Albina's Exhibit 44?

Q. What is the document that you have there?

A. This is a copy of the survey made by the U. S. Salvage Association. [138]

Q. Whom was the survey made by? That is, who signed it for the Salvage Association?

A. Mr. K. A. Webb, Surveyor.

Q. Is he a surveyor that has been with the U. S. Salvage Association for many years?

A. That is right.

Q. And located in Portland?

A. That is correct.

(Testimony of John Sutherland.)

Q. Who were the representatives of Luckenbach Company that attended at that time?

A. H. W. Sterling was the owner's representative.

Q. Those other persons named on the first sheet of that survey as participating, did they represent those various interests that are named there?

A. To my knowledge, they did. Brewer and Bailey, of course, are from Albina, and Jim Slater from Pillsbury and Martignoni. And I know these other people from the American Bureau of Shipping and the United States Coast Guard. Of course, I don't know that they were in attendance, but I assume that they were.

Mr. Gearin: May I ask a question on voir dire to straighten myself up?

The Court: Yes.

Mr. Gearin: Were you present at the survey?

A. No.

Q. (By Mr. Krause): Now, does that Exhibit 44 list the repairs [139] to be made to the Robert Luckenbach? A. Yes, it does.

Q. And did Albina make those repairs that were stated in there as necessary?

A. Yes, we did. We accomplished these repairs.

Q. Will you just tell the Court how, if at all, you were authorized to do the work?

A. We were authorized by Herb Sterling to accomplish the repairs. I had cautioned our people in the field not to make the repairs until we did have authorization, and in the course of events Herb

(Testimony of John Sutherland.)

Sterling orally authorized us to make these repairs.

Q. What, if anything, was said about a written order for the repairs?

A. Well, we requested a written order from Mr. Sterling, and he indicated that it would be forthcoming in the normal manner, but, in any event, to get along with the repairs and he would cover us at a later date.

Q. Did you have any conversation with Mr. Sterling at any later date regarding that written order for the work?

A. He informed me at a later date that his New York office had advised him not to issue a written order.

Q. So you did not get a written order?

A. That is right.

Q. When did this information from Mr. Sterling come with [140] respect to the time when the repairs were made?

A. To the best of my recollection, it was after the repairs were accomplished.

Q. Did Albina bill the Luckenbach Steamship Company for the cost of the repairs? A. Yes.

Q. Where was the bill sent?

A. The bill was sent to Seattle, and in turn they sent it on to New York or Brooklyn.

Q. When you say Seattle——

A. Their Seattle office.

Q. To whom was it directed?

A. It wasn't directed to anyone in particular.

Q. Just the Luckenbach office?

(Testimony of John Sutherland.)

A. That is right.

Q. Did the Luckenbach Company pay the bill?

A. No.

Q. Did they indicate whether they were going to pay the bill or not?

A. They indicated that they were not going to pay the bill.

Q. Now, would you look in this order and tell us what the amount was of the cost of repairs?

A. The total billing was $28,933.89.

Q. Does that survey report contain all of the items going to make up the bill? [141]

A. Yes.

Q. That was all labor and material, dry-docking expenses, and so on? Were they all included?

A. That is correct.

Q. Did that bill show any item of profit?

A. No, this billing was made without profit.

Q. Do you know what the circumstances were regarding the billing without profit?

A. Yes. The work was accomplished before the figures were compiled, and we were advised by the U. S. Salvage Association, inasmuch as they had to approve these figures, to figure it on a non-profit basis; that inasmuch as we were involved in this thing we should figure it on a non-profit basis. That was perfectly agreeable to us inasmuch as we were dealing with a very good customer.

Q. That was in order to have Mr. Webb approve it as surveyor? A. That is right.

Q. For the U. S. Salvage. He told you not to

(Testimony of John Sutherland.)

figure any profit in? A. That is correct.

Q. Does it include your overhead and administrative expenses?

A. General and administrative costs, yes.

Q. But no profit? A. That is right.

Mr. Krause: I think you may cross-ex- [142] amine.

Mr. Gearin: I have no questions.

Cross-Examination

By Mr. Wood:

Q. Mr. Sutherland, were you present when the arrangements were made between Mr. Sterling and your people about making these repairs?

A. Well, it was through me that the repairs were authorized.

Q. Whom did you deal with?

A. Mr. Sterling.

Q. Direct? A. That is correct.

Q. Did you have your men go aboard the ship and make the repairs without any specific authorization from Sterling but merely with his permission that you could do so? A. No, no.

Q. What? A. No, we didn't.

Q. It wasn't that way? A. No.

Q. Was there any understanding that you know of on the part of Mr. Hussa, President of your company, and Mr. Sterling that these repairs would be made for the account of your own company since yours was the fault?

(Testimony of John Sutherland.)

A. No, I am quite certain that there was no understanding—— [143]

Q. Nothing like that? A. No.

Q. You were not present, however, at the conversations between Mr. Sterling and Mr. Hussa, were you?

A. I doubt very much whether Mr. Sterling and Mr. Hussa even discussed it.

Q. I was struck by your statement that Mr. Sterling sent the bill apparently on to New York, his head office, and there it was rejected. Is that what you said? A. That is correct.

Q. Was it the custom for Mr. Sterling in ordering any repairs on ships from you to get authorization or ratification from his New York office?

A. No. I would like to clarify that a little bit. Not to my knowledge. He may have discussed it with New York prior to the time he put the order in.

Q. You don't know about that?

A. That is right.

Q. However, in this particular instance it was New York that made the final decision about this bill, wasn't it? A. That is right.

Mr. Wood: That is all.

Mr. Gearin: That is all.

(Witness excused.) [144]

Mr. Krause: I would like to offer in evidence again this Respondent Albina's Exhibit 45 as showing the repairs made to the vessel and the amounts

charged for the various items, the cost of making the repairs, and the people who participated in determining what repairs should be made.

Mr. Gearin: That has been admitted.

The Court: It was admitted for a special purpose.

Mr. Gearin: I have no objection to it being admitted generally.

Mr. Wood: I haven't either.

The Court: It is admitted generally.

(The Survey Report referred to was received in evidence as Respondent Albina Engine & Machine Works Exhibit 45.)

RESPONDENT'S EXHIBIT No. 45

United States Salvage Association, Inc.
99 John Street, New York 38, N. Y.

Case No. 80-3279

Cargo Damage A/C Fire
April 2, 1958

Portland, Oregon
September 16, 1958.

Albina Engine & Machine Works
S.S. Robert Luckenbach

Conditions

All services of this Association are offered and this and all other reports and certificates are issued on the following conditions:

Respondent's Exhibit No. 45—(Continued)

(1) While the officers and the Board of Directors of United States Salvage Association, Inc., have used their best endeavors to select competent surveyors, employees, representatives and agents and to insure that the functions of the Association are properly executed, neither the Association nor its officers, directors, surveyors, employees, representatives or agents are under any circumstances whatever to be held responsible for any error of judgment, default or negligence of the Association's surveyors, employees, representatives or agents nor shall the Association or its officers or directors under any circumstances whatever be held responsible for any omission, misrepresentation or misstatement in any report or certificate.

(2) That under no circumstances shall this report or certificate be used in connection with the issuance, purchase, sale or pledge of any security or securities, or in connection with the purchase, sale, mortgage, pledge, freighting, letting, hiring or charter of any vessel, cargo or other property, and if so used this document shall be null, void and of no effect and shall not be binding on anyone.

The terms of these conditions can be varied only by specific resolution of the Board of Directors of the Association and the acceptance or use of the services of the Association or of its surveyors, employees, representatives or agents or the use of this or any other report or certificate shall be construed to be an acceptance of the foregoing conditions.

Respondent's Exhibit No. 45—(Continued)

This Report Is Exclusively for the Use and Information of Underwriters

Report of Survey made by the undersigned surveyor of the United States Salvage Association, Inc., on April 3, 5 & 10, 1958, at the request of Jewett, Barton, Leavy and Kern, Portland, Oregon, on shipments of cargo, as they lay in the No. 4 and 5 holds of the S.S. "Robert Luckenbach" 7882 Gross Tons, 245923 Official Number, Luckenbach Steamship Company, Owner and Operator, while the vessel lay afloat at the Luckenbach Terminal, Portland, Oregon, and while the cargo was lying on the dock and on barges, subsequent to discharge from the vessel, in order to ascertain the nature and extent of damage alleged to have been sustained in consequence of a fire in No. 5 Lower Hold, on April 2, 1958, at 1815.

Attending:

Messrs. H. W. Sterling, representing Owners of Vessel; V. C. Burdick, representing Owners of Dock; R. S. Brewer, representing Albina Engine & Machine Works; James Slater, representing Pillsbury & Martignoni; W. O. Haines, representing Pillsbury & Martignoni; U. S. Coast Guard Inspectors and other interested parties.

It is reported that fire was discovered in No. 5 Lower Hold, forward, at 1815 April 2, 1958, and alarm was sounded inmmediately, bringing units of the Portland Fire Department to the scene, including fire boats and rolling equipment. The fire was

Respondent's Exhibit No. 45—(Continued)

brought under control at 1945, April 2, 1958, and subsequent to survey on April 3, 1958, damaged cargo was discharged from the vessel to a barge under the supervision of members of the Portland Fire Department who were detailed to remain on the spot until danger of further outbreak had passed.

The major portion of the cargo which was discharged to a barge under the supervision of the members of the Portland Fire Department was debris and charred pieces of cargo, with no salvage value whatsoever.

Cargo stowed in No. 4 Tween Deck and Lower Hold, and in No. 5 Lower Hold, which was not completely destroyed by the fire, was subsequently discharged to the dock and to barges for further disposal. This cargo is covered under thirteen (13) separate bills of lading, which are listed below, with details of damage, extent of damage and of salvage.

Vessel—S. S. Robert Luckenbach—Voy. 910

Lot #1

B/L #B-12-R 2/19/58

Shipper—Elliot Addressing Machine Co., Cambridge, Mass.

Consignee—W. E. Finzer & Co., 215 S.W. Park, Portland, Ore.

Marks—11681

Commodity—1 Crated Addressing Machine

Weight—368#

Remarks: No exceptions at loading port.

Respondent's Exhibit No. 45—(Continued)

The crate containing this machine was badly burned and charred, and the machine itself was badly warped, with no salvage value except for the motor and spare parts which were not damaged.

Total value landed at Portland	$708.52	
Salvage obtained from motor and parts	50.00	
Total loss		$658.52

Lot #2

B/L #B-33-R

Shipper—Pejepscot Paper Division, Hurst Publishing Co., Inc., Brunswick, Maine.

Consignee—School District No. 1, Storeroom, 115 N.E. 6th, Portland, Oregon.

To the order of—Fraser Paper Co., 25 N.W. Front St., Portland, Ore.

Marks—Order #C-23499.

Commodity—1247 Ctns. of construction paper & school practice paper.

Gross Weight—83,159#.

Net Weight—79,000#.

Remarks: No exceptions at loading port.

This cargo was all fire or water damaged as a result of the fire. Part of the shipment was discharged as debris to one of the barges and the remainder was discharged to the dock. Mr. Ed Fraser and the city storekeeper examined and checked the portion of the shipment which was discharged to the dock as being only partially damaged from water and none of the paper was acceptable to the storekeeper for the Portland School District No. 1. The Fraser

Respondent's Exhibit No. 45—(Continued)

Paper Company agreed to accept that portion of the shipment which was wrinkled and wet, but salvageable on a 50% of cost value. The following are details of cost, salvage, and loss.

1. Original sound value	$15,652.76	
2. 50% of value of paper accepted by the Fraser Paper Company	1,903.82	
3. Labor separating damaged paper from good paper	57.00	
4. Salvage from scrap	177.88	
Final Loss		$13,628.06

Lot #3

B/L #P-11-R 2/25/58.

Shipper—Hershey Chocolate Company, Hershey, Penn.

Consignee—Hershey Chocolate Co., Portland, Ore.

Commodity—2121 Bxs. of confectionery, 1720 Bxs. of cocoa, 1756 Ctns. of chocolate syrup, 1 Ctn. of thermometers.

Total Weight—127,172#.

This cargo was stowed in No. 4 Tween Deck and the main cause of damage to this particular shipment was water and smoke, with a loss outlined as follows:

1—Fire damage	$ 145.02
2—Water damage	2,280.00
3—Smoke and/or water damage	20,371.50

Of the total shipment, the following is a breakdown of the various units which were in the vessel during the fire, and that which was discharged prior to the fire.

Respondent's Exhibit No. 45—(Continued)

Type of Product	Total in Shipment	Discharged Prior to fire	In Vessel During fire
Confectionery	2,121 ctns	1,551 ctns	570 ctns
Cocoa	1,720 ctns	1,447 ctns	273 ctns
Syrup	1,756 ctns	6 ctns	1,750 ctns
Thermometer	1 ctn	1 ctn	—
Totals	5,598 ctns	3,005 ctns	2,593 ctns

Subsequent to extinguishing of the fire the cargo in the holds was discharged to the dock, where it was again examined by all in attendance and it was mutually agreed that the cargo of cocoa products had been subject to smoke, heat and water damage.

In order to recover and recondition the greatest possible amount of the damaged cargo, it was also agreed that the best procedure would be to ship all salvageable cargo back to the manufacturer at Hershey, Pennsylvania, and that cargo which was not salvageable and unfit for human consumption should be destroyed by burning.

This procedure was carried out and the following are recapitulations of cargo shipped back to the factory, destroyed by burning, pilferage and shortage.

1. Cargo returned by rail car to Hershey Chocolate Co., Hershey, Pa.

Quantity	Item Code No.	Quantity	Item Code No.
223 ctns	40	10	163
99	104	36	165
9	120	126	300
24	154	210	305
23	155	42	309R
14	51	485	310
258	52	750	315
46	332	42	340
48	333		
10	46		

Total shipped back to factory .....2,455 ctns.

Respondent's Exhibit No. 45—(Continued)

2. Cargo noted short on vessel and considered destroyed as a result of fire.

Quantity	Item Code No.	
2	40	
1	104	
4	134	
3	190	
2	191	
6	148-1	
1	310	Short and destroyed as a result of fire

.....19 ctns.

3. Cargo declared unfit for human consumption and unsalvageable, taken to incinerator to be burned.

Quantity	Item Code No.
5	154
4	155
41	40
45	104

Total unsalvageable cargo to be burned .....95 ctns.

4. Pilferage—Storeroom exception—265

B/L	P-11R
2/25	217
3/30	104
2/16	154
1	115-2
1	55-2
3	134
3	2
1	40-2
7	191

Lot #4

B/L D-13-R 2/19/58.

Shipper—Carl Berwick & Co., 81 Thomas St., Worcester, Mass.

Consignee—Peyton Bag Co., 33 S.E. Yamhill, Portland, Ore.

Marks—Same.

Commodity—100 bales of 2nd hand bags.

Total Weight—2,580#.

Respondent's Exhibit No. 45—(Continued)

Remarks: No exceptions noted at loading port. Discharged from vessel April 3, 1958. Total sound value of cargo $5,794.07.

This cargo was stowed in No. 5 Lower Hold and subsequent to extinguishing of the fire, 43 bales which were water damaged were discharged to the dock, and 57 bales which were fire damaged were discharged to the barge on the offshore side of the vessel.

Those bales numbering 57, which were fire damaged were considered a total loss with no salvage value, but the bales which were water damaged were offered as salvage, and two (2) bids were extended, one for $720.00 and one for $750.00 from Sugarman Bros., of San Francisco. The bid of $750.00 was accepted and the 43 water damaged bales were thus sold.

Final loss $5,044.07

Lot #5

This cargo was discharged from the S. S. Marine Snapper at Los Angeles, California, on voyage #906 and reloaded into the S. S. "Robert Luckenbach" at Los Angeles for Portland.

B/L Nos. NK-16-R Marine Snapper.
A-1-R Robert Luckenbach.

Shipper—George LaMonte & Son, Nutley, N. J.

Consignee—Blake Moffitt and Towne, Portland, Oregon.

Marks—As above.

Respondent's Exhibit No. 45—(Continued)
Commodity—2 ctns. of printing paper,
2 ctns. of printing paper.
Total Weight—580#.
Remarks: No exceptions.

No trace of this cargo was found and it was adjudged a total loss with a sound value of $195.48.

$195.48

Lot #6

This cargo was discharged from the S. S. Marine Snapper at Los Angeles, California, on voyage #906 and reloaded into the S. S. "Robert Luckenbach" at Los Angeles for Portland.

B/L Nos. NK-32-R Marine Snapper.
A-1-R Robert Luckenbach.
Shipper—George LaMonte & Son, Nutley, N. J.
Consignee—Zellerbach Paper Co., Portland, Ore.
Marks—#51237.
Commodity—7 ctns. printing paper.
Weight—917#.

No trace of this cargo was found and it was adjudged a total loss with a sound value of $254.70.

$254.70

Lot #7

B/L No. D-4-R 2/11/58.
Shipper—H. S. Bernstein, Taunton, Mass.
Consignee—Leonetti Furniture Co., Portland, Oregon.
Marks—Same.

Respondent's Exhibit No. 45—(Continued)
Commodity—1 bale of cotton piece goods.
Weight—326#.
Remarks—No exceptions.

This bale of cotton piece goods outturned badly burned and was adjudged a total loss with a value of $301.83.

$301.83

Lot #8

This cargo was discharged from the S. S. Marine Snapper at Los Angeles, California, on voyage #906 and reloaded into the S. S. "Robert Luckenbach" at Los Angeles for Portland.

B/L NK-33-R Marine Snapper.
A-1-R Robert Luckenbach.
Shipper—Duro-Dyne Company, Farmingdale, Long Island, N. Y.
Consignee—Pacific Metal Co., Portland, Oregon.
Marks—Same.
Commodity—14 ctns. deck connectors.
Weight—900#:
Remarks: No exceptions. Discharged April 3, 1958.

This cargo was discharged in error ex the "Marine Snapper" at Los Angeles and forwarded to Portland on the S. S. "Robert Luckenbach" and the cargo discharged to the dock with the cartons opened and slight damage to the contents with corrosion started.

Original value $338.50
Salvage value 50% 169.25

$169.25

Respondent's Exhibit No. 45—(Continued)

Lot #9

B/L B-5-R 2/12/58.
Shipper—Tribble Cordage Mills, Inc., Woburn, Mass.
Consignee—American Brush Co., 15 N.E. 6th Ave., Portland.
Marks—Same as above.
Commodity—2 ctns. of cotton cordage.
Remarks: No exceptions. Outturned, one (1) ctn. short and adjudged as being lost as result of the fire with the following description of contents.

14 oz. Trojan mop heads, total value and loss $212.80

Lot #10

B/L B-7-R 2/12/58.
Shipper—Walberg and Auge, Worcester, Mass.
Consignee—L. D. Heater Music Co., Portland, Ore.
Marks—Same.
Commodity—3 ctns. of steel stands.
Weight—573#.
Remarks: No exceptions.

This cargo outturned to the dock in a badly fire damaged and warped condition.

Total value $589.53
Total loss 589.53
$589.53

Respondent's Exhibit No. 45—(Continued)

Lot #11

B/L B-14-R & T-10-R.
Shipper—F. H. Snow Canning Co., Inc., Wildwood, N. J.
Consignee—Northwest Grocery Co., Portland, Ore.
Marks—Various.
Commodity—1170 ctns. canned goods,
1019 ctns. canned goods.
Remarks: No exceptions at loading port.

It is reported that 883 cartons of this shipment was discharged to the dock prior to the fire, leaving 1306 ctns. in the vessel at the time of the fire. The damage suffered by this shipment consisted mainly of water damage, requiring relabeling and repacking of the cans in the cartons after cans were dried off.

Total value of shipment $11,820.28
Total loss resulting from damaged cans and labor and materials involved in relabeling and repacking $214.08

Lot #12

This shipment was discharged from the "Horace Luckenbach" at Los Angeles, California, and reloaded into the "Robert Luckenbach" for shipment to Portland, Oregon.

B/L Nos. N-75-R Horace Luckenbach.
A-1-R Robert Luckenbach.

Respondent's Exhibit No. 45—(Continued)

Shipper—Dana Distributing, Inc., 401 Broadway, New York.

Consignee—Panda Terminals, Inc., 20 S.E. Clay St., Portland, Ore.

Ultimate Consignee—Bruce Emmett & Co., Portland, Oregon.

Marks—Same as above.

Commodity—583 ctns. of conduit outlet boxes, 1/S & W/Q attachments.

Weight—7,929#.

Remarks: No exceptions. Outturned one (1) carton wet and open with contents adrift and four (4) pieces short. This one carton was apparently over landed at Los Angeles from the Horace Luckenbach and shipped on to Portland via the "Robert Luckenbach." When landed on the dock, four (4) boxes out of twenty (20) in the carton were missing and all were rejected by the consignee on account of water damage. Total value $18.40 less 20% for shortage, or $14.72. This carton was sold for $4.00 for salvage with a net loss of $10.72.

Net loss .....$ 10.72

Lot #13

B/L L-1-B 4/1/58.

Shipper—Longview Fiber Co., Longview, Wash.

Consignee—Waltham Bag & Paper Co., Waltham, Mass.

Marks—Various numbers.

Commodity—5906 bag rolls of wrapping paper.

Respondent's Exhibit No. 45—(Continued)

Total Weight—1,405,237#.

Remarks: No exceptions at loading port.

This cargo was loaded at Longview, Washington, on April 1, 1958, in No. 4 & 5 hatches. Subsequent to the extinguishing of the fire, the damaged portion of the cargo was discharged to two (2) barges for transport back to the Longview Fibre Co., at Longview, Washington, for reconditioning and salvage.

The original count of loading onto the two barges was 3,476 rolls, but upon discharge at Longview it was found that actual count was 3,369 rolls, which were reconditioned and subsequently shipped out on the S. S. Horace Luckenbach for delivery to Waltham, Mass., via Boston.

The following are details of the total shipment and its value, and the breakdown on portions delivered by the Robert Luckenbach and Horace Luckenbach, and the damage and loss.

Original shipment, 1,403,571# valued at	$144,309.13	
Delivered by S. S. Robert Luckenbach, 554,519# valued at	57,500.33	
Delivered by Horace Luckenbach, 569,484# valued at	58,142.98	
Original total value	$144,309.13	
Value of cargo delivered	115,643.34	
Value of cargo lost/damaged	$ 28,665.82	
Plus cost of trucking, barging, reconditioning and salvage cost	5,302.38	
	$ 33,968.20	
Less Salvage for 16,247# @ 26.25 per ton	213.24	
Total Net Loss	$ 33,754.96	$33,754.96

Respondent's Exhibit No. 45—(Continued)

No details have been presented to date giving cost of shipment and reconditioning of the damaged cocoa products outlined on the B/L #P-11-R, 2/25/58.

The following charges have been presented which are incidental to salvage and reconditioning of the cargo.

Willamette Tug and Barge Co.	$ 3,385.60
Port of Longview	2,253.82
Martin Transfer Co.	674.70
Martin Transfer Co.	1,466.42
Longview Fibre Co.	6,086.39
	$13,866.93

The following is a recap of all losses and charges attributed to this incident, which have been presented to date.

Value of cargo loss, exclusive of Lot #3, under B/L P-11-R	$ 49,429.79
Charges presented incidental to salvage, reconditioning and transport of cargo	13,866.93
Total	$ 63,296.72

Submitted without prejudice.

/s/ P. F. BUTLER,
Surveyor.

Received in evidence January 6, 1960.

Mr. Krause: That is our case, your Honor.

The Court: That is your case, Mr. Krause?

Mr. Krause: Yes, your Honor. We have no further testimony.

The Court: Mr. Wood, do you have any testimony?

Mr. Wood: No, your Honor. We are relying on the Coast Guard testimony, which it was stipulated may be used, and on the testimony that has already been offered in this court.

The Court: Yes. Mr. Gearin?

Mr. Gearin: We have nothing further, your Honor.

The Court: I understand, Mr. Wood, that you still have [145] some work that you said you had to do on your trial brief?

Mr. Wood: It will only take me a few minutes.

The Court: In addition to that, Mr. Wood, do you want to reply to Mr. Gearin's brief?

Mr. Wood: Yes, I would like to make a brief reply.

The Court: And you will want, as I understand it, approximately one week for that?

Mr. Wood: Yes. I don't really think I will require that much, but I will take that.

The Court: And then you would like about a week or ten days, Mr. Krause?

Mr. Krause: Not any more than a week, your Honor. I would just as soon get it in.

The Court: Then one week for you to reply, and if there are any new matters or if within that period of time there are any supplemental briefs that any of you might like to file, you have the Court's permission to file them.

Mr. Krause: Thank you, sir.

The Court: As you know, Gentlemen, the Court

is particularly interested in the contentions between the two respondents here, Albina and Luckenbach. Although I am not deciding the issue at the present time, it does appear to me there is liability to libelants. Have that in mind when you proceed with your briefs. When I say "liability" I don't mean by that I am saying there is joint liability. I am saying there should be [146] liability some place. That is the way it appears to the Court now; that is, from the factual situation as to how the fire started, and of course there was some damage.

Do you gentlemen have anything more you would like to mention to the Court?

Mr. Wood: I am passing up Luckenbach's brief, your Honor.

The Court: Yes, Mr. Wood.

(Whereupon proceedings in the above matter on said date were concluded.) [147]

[Title of District Court and Cause.]

Civil No. 9997

(Also: Civil Nos. 10,002, 335-59, 336-59 and 328-59.)

REPORTER'S CERTIFICATE

I, John S. Beckwith, an Official Reporter of the above-entitled Court, do hereby certify that on January 6-7, 1960, I reported in shorthand the proceed-

ings occurring in the above-entitled matter; that I thereafter caused my said shorthand notes to be reduced to typewriting under my direction, and that the foregoing transcript, consisting of Pages 1 to 147, both inclusive, constitutes a full, true and correct transcript of said proceedings, so reported by me in shorthand on said dates, as aforesaid, and of the whole thereof.

Dated at Portland, Oregon, this 12th day of July, 1960.

/s/ JOHN S. BECKWITH,
Official Reporter.

[Endorsed]: Filed August 16, 1960.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Libel in rem and in personam (Civil No. 9997), Libel in rem and in personam (Civil No. 10002), Order allowing Northwest Grocery Company to join in libel, Summary Petition for joinder of cause, Answer of Luckenbach Steamship Company, Inc., etc., Libel (transferred from Southern Division, Northern Dis-

trict, California, No. 27791), Amended libel in rem and in personam (Civil No. 328-59), Libel in personam (Civil No. 336-59), Answer of Albina Engine & Machine Works, Inc., to Amended Cross-Claim, etc., Answer of respondent Albina Engine & Machine Works, Inc., Answer to Cross-Claim and Cross-Libel against Luckenbach Steamship Company, Inc., Answer to Cross-Libel against Luckenbach Steamship Company, Inc., Answer to Cross-Claim and Cross-Libel against Luckenbach Steamship Company, Inc., Answer of Respondent Albina Engine & Machine Works, Inc., Amended Cross-Claim and Cross-Libel of Luckenbach Steamship Company, Inc., against Albina Engine & Machine Works, Inc., etc., Libel in personam (Civil 335-59), Petition under Rule 56 Admiralty to bring in Luckenbach Steamship Co. as third-party respondent, (No. Civil 335-59), Petition under Rule 56 Admiralty to bring in Luckenbach Steamship Company, Inc., as third-party respondent, (No. Civil 336-59), Answer of Albina Engine & Machine Works, Inc. (Civil 335-59), Answer of Albina Engine & Machine Works, Inc., (Civil 328-59), Answer of Albina Engine & Machine Works, Inc. (Civil 336-59), Cross-Libel of Albina Engine & Machine Works, Inc., against Luckenbach Steamship Co., Inc., Stipulation (Civil 328-59), Answer of Luckenbach Steamship Company, Inc. to impleading petition of Albina Engine & Machine Works, Inc., etc., (Civil No. 335-59), Answer of Luckenbach Steamship Company, Inc. to impleading petition of Albina Engine & Machine Works, Inc., etc. (Civil

336-59), Answer of Luckenbach Steamship Company, Inc. to Cross-Libel, Answer of Luckenbach Steamship Company, Inc. and Cross-Claim, Proposed Interlocutory Decree, Consolidated Pretrial Order, Amendments to pretrial order, Opinion, Findings of fact and conclusions of law proposed by claimants, et al., Request of Albina Engine & Machine Works, Inc., for additional findings, Objections of Albina Engine & Machine Works, Inc., to proposed findings, etc., by libelants, Objections of Albina Engine & Machine Works, Inc., to proposed findings by Luckenbach Steamship Company, Inc., Objections of Luckenbach Steamship Company, Inc. to findings and conclusions requested by Albina Engine & Machine Works, Inc., Findings of fact and conclusions of law (Consolidated cases), Interlocutory Decree (Consolidated cases), Notice of Appeal, Bond for Cost on Appeal, Order allowing extension of time to docket appeal, Order to transmit original exhibits to Circuit Court, Designation of record on appeal, Transcript of docket entries (Civil 9997), Transcript of docket entries (Civil 10002), Transcript of docket entries (Civil 328-59), Transcript of docket entries (Civil 335-59), and Transcript of docket entries (Civil 336-59), constitute the record on appeal from an interlocutory decree of said court in cause therein numbered Civil 9997 and Consolidated causes numbered 10001, 10002, 328-59, 335-59 and 336-59, in which Albina Engine & Machine Works, Inc., an Oregon corporation, is Respondent, Cross-Respondent, Cross-Libelant and Appellant, and Hershey Chocolate Corporation, a Delaware corpo-

ration, No. Civil 9997, Zellerbach Paper Co., a California corporation, No. Civil 10002, Peyton Bag Company, a corporation, No. Civil 328-59, W. E. Finzer & Company, a corporation, No. Civil 335-59 and Pejepscot Paper Division-Hearst Publishing Company, Inc., a corporation, are libelants and appellees, and Luckenbach Steamship Company, Inc., a corporation, is respondent, cross-claimant, cross-respondent and appellee; that the said record on appeal has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant and in accordance with the rules of this court.

I further certify that there is enclosed herewith reporter's transcript of testimony, dated January 6-7, 1960, filed in this office in this cause, together with all exhibits, except exhibit No. 26, being shipped by auto freight.

I further certify that the cost of filing the notice of appeal $5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 22nd day of August, 1960.

[Seal] R. DeMOTT,
Clerk.

By /s/ MILDRED SPARGO,
Deputy Clerk.

[Endorsed]: No. 17070. United States Court of Appeals for the Ninth Circuit. Albina Engine & Machine Works, Inc., an Oregon corporation, Apant, vs. Hershey Chocolate Corporation, a Delaware corporation, et al., Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed August 23, 1960.

Docketed September 2, 1960.

FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Before the United States Court of Appeals
for the Ninth Circuit

No. 17070

ALBINA ENGINE & MACHINE WORKS, INC., an Oregon Corporation,

Appellant,

vs.

HERSHEY CHOCOLATE CORPORATION, a Delaware Corporation; ZELLERBACH PAPER COMPANY, a California Corporation; PEYTON BAG COMPANY, a Corporation; W. E. FINZER & COMPANY, a Corporation; PEJEPSCOT PAPER DIVISION-HEARST PUBLISHING COMPANY, INC., a Corporation; LUCKENBACH STEAMSHIP COMPANY, INC., a Delaware Corporation; and NORTHWEST GROCERY COMPANY, an Oregon Corporation,

Appellees.

APPELLANT'S STATEMENT OF POINTS ON APPEAL

I.

Finding of Fact No. II is erroneous in adopting the Court's Opinion as findings of fact and conclusions of law, in that the Court's said Opinion does not separately state findings of fact and conclusions of law and for the further reason that said Opinion is unsupported by and contrary to the clear weight of the evidence and is otherwise erroneous in law.

II.

The Court's Opinion, adopted as findings of fact and conclusions of law, is erroneous in making the following findings, conclusions, statements or holdings:

1. The Court erred in finding that "the can contained little water" (Op. p. 7, line 18), in that such finding is not supported by any substantial evidence and is contrary to the clear weight of the evidence.

2. The Court erred in finding or concluding that Sterling did not know of the failure to connect the city fire hydrant to the ship, nor that any welding was to be done on the forward ladder in No. 5 hold, in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

3. The Court erred in finding, concluding or stating that Albina's "use of an acetylene torch * * * under these conditions, was nothing less than wanton conduct. No doubt, it created a situation where the rule of absolute liability should apply," in that such finding, conclusion or statement is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

4. The Court erred in finding or concluding that "Albina was guilty of negligent conduct in using the acetylene torch under the conditions and circumstances then and there existing," in that such

finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

5. The Court erred in finding or concluding that Albina was negligent by reason of violation of Code of Federal Regulations, Title 46, §142.02-20 in that said regulation is, as a matter of law, not applicable to a party in the position of Albina under the facts and circumstances in this case.

6. The Court erred in finding or concluding that said regulation applies to Albina in that said finding or conclusion is erroneous in law.

7. The Court erred in finding or concluding that §16-2527 of the Police Code of the City of Portland is not in conflict with Federal statutes and regulations, in that such finding or conclusion is erroneous in law.

8. The Court erred in finding or concluding that Albina was negligent and caused the fire under specifications Nos. 1, 2, 3, 4, 5, 6, 7 and 8 (of the Consolidated Pretrial Order) in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

9. The Court erred in finding, concluding or stating that Sterling ordered repairs to be made to the after ladder while the repairs were undertaken at the forward ladder, in that such finding, conclusion or statement is wholly immaterial to the issues in the case.

10. The Court erred in finding or concluding that Albina "without further instructions" made repairs at a place other than that where ordered, in that such finding or conclusion is not supported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

11. The Court erred in finding or concluding that Radovich, the Marine Superintendent, did not arrive on the vessel until 6:10 p.m., in that said finding or conclusion is not supported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

12. The Court erred in finding or concluding that at 6:10 p.m., Radovich did not know that repairs were being made on a ladder other than pursuant to the original instructions, in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

13. The Court erred in finding or concluding that Radovich was a subordinate and that his duties were very limited, in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

14. The Court erred in finding or concluding that Radovich had nothing whatsoever to do with the repair of the ship, in that such finding or conclusion is unsupported by any substantial evidence,

is contrary to the clear weight of the evidence and is otherwise erroneous in law.

15. The Court erred in finding or concluding that the burden is on the libelant to prove that the neglect of the owner caused the fire, in that such finding or conclusion is erroneous in law.

16. The Court erred in attempting to distinguish American Mail Line, Ltd. vs. Tokyo Marine & Fire Insurance Co., Ltd., 9th Cir., 1959, 270 F. 2d 499, upon the basis that in the instant case there is no evidence that anyone failed to use reasonable diligence after the start of the fire, in that such distinction is of no legal import, and is immaterial under the clear weight of the evidence as to the facts and circumstances of this case.

17. The Court erred in finding or concluding that the fire statute is applicable, in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

18. The Court erred in finding or concluding that Luckenbach and its superior officers were guilty of no negligence which caused the fire, in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

19. The Court erred in finding or concluding that the fire was caused by Albina, in that such finding or conclusion is unsupported by any substan-

tial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

20. The Court erred in finding or concluding that no superior officer for Luckenbach had anything to do with welding on the forward ladder, in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

21. The Court erred in finding or concluding that Radovich had nothing to do with the repair of the ship or with removal of cargo from around the ladder, in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

22. The Court erred in finding or concluding that Albina is liable to Luckenbach, on the basis of a breach of the warranty of workmanlike service, in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

23. The Court erred in finding or concluding that the other questions raised by the briefs, with the possible exception of general average, are academic, in that such finding or conclusion is erroneous in law.

24. The Court erred in finding or concluding that libelants are entitled to a decree against Albina

in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

25. The Court erred in finding or concluding that Luckenbach is entitled to a decree against Albina for damage to the vessel, in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

26. The Court erred in finding or concluding that Albina is not entitled to a decree against Luckenbach for indemnity, in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

27. The Court erred in finding or concluding that Albina is not entitled to a decree against Luckenbach for the repairs to the vessel other than repairs independent of the fire, in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

III.

Finding of Fact No. III, that the fire was not caused by the design or neglect of Luckenbach, is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

IV.

Finding of Fact No. IV, that the fire was caused by the gross negligence of Albina, is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

V.

Finding of Fact No. VI, insofar as it finds that Radovich was a mere subordinate employee of Luckenbach and not a managerial officer, that his functions were confined to Luckenbach's dock in Portland, that he reported to his superiors in the Portland uptown office, and that he had nothing to do with repairs, is unsupported by any evidence whatever.

VI.

Finding of Fact No. VII, insofar as it finds that Sterling did not know that the welding was to be on the forward ladder and that if the welding had been done aft there would have been no fire, is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

VII.

Finding of Fact No. X, that Radovich had nothing to do with the repairs to the ladders and no knowledge with respect to removal of a section of the fire line, or the arrangements to supply substitute water from the dock hydrant, is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

VIII.

Finding of Fact No. XI, insofar as it finds that Radovich did not know the welders would be aboard until he saw the sparks, is unsupported by any evidence whatever, and the remainder of said finding is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

IX.

Finding of Fact No. XII, that neither Sterling nor Radovich were privy to the cause or progress of the fire, is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

X.

Finding of Fact No. XIII, insofar as it finds that the fire was caused solely by the gross negligence of Albina, that the welding could have been safely done if proper and usual precautions were taken, that if any of the suggested precautions were taken there would have been no fire, that no precaution was taken, and that the only thing relied on was a can of longshoreman's drinking water which was utterly inadequate, is self-contradictory, is speculative, is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

XI.

Finding of Fact No. XVI, that Albina made no objection to Luckenbach with respect to conditions

in the hold, is erroneous in that it is immaterial, irrelevant, ignores other facts, and ignores Luckenbach's duty to be aware of conditions in the hold.

XII.

Finding of Fact No. XVII, that there was no contractual or other obligation by Luckenbach with respect to the readiness and availability of the fire line and that Albina in no way relied on it when it undertook the job, is unsupported by any substantial evidence, is contrary to the clear weight of the evidence, and is otherwise erroneous in law.

XIII.

Conclusions of Law Nos. I through VI, inclusive, are contrary to law, unsupported by any substantial evidence, and contrary to the clear weight of the evidence.

XIV.

The Court erred in holding that the sole cause of damage was negligence by Albina.

XV.

The Court erred in refusing to hold that Luckenbach's negligence and/or the unseaworthiness of the vessel constituted the sole or a contributing cause of the fire.

XVI.

The Court erred in refusing to hold that Luckenbach's negligence and/or the unseaworthiness of the vessel constituted the sole cause of the spread

of the fire beyond the burlap and construction paper stowed forward of the forward ladder in No. 5 hold.

XVII.

The Court erred in refusing to hold that Luckenbach's negligence and/or the unseaworthiness of the vessel constituted the sole proximate cause of all fire damage to the vessel.

XVIII.

The Court erred in refusing to conclude that libelants' sole right of recovery was against Luckenbach or, in the alternative, in refusing to conclude that Albina was entitled to indemnity or contribution from Luckenbach, for such amounts as Albina might be required to pay to the libelants.

XIX.

Based upon the foregoing points, Appellant Albina contends that the Decree of the District Court was erroneous in awarding any recovery to the libelants against Albina, and in awarding any recovery to cross-claimant Luckenbach against Albina, and in denying Albina recovery against Luckenbach on its cross-libels, and further contends that a decree should have been entered dismissing the libels against Albina and allowing Albina its costs, or, in the alternative, that a decree should have been entered against Luckenbach allowing Albina to recover from Luckenbach indemnity or contribution on account of all amounts which Albina was required to pay to the libelants, and in any event that

the decree entered should have dismissed Luckenbach's cross-claims against Albina and should have allowed recovery against Luckenbach on Albina's cross-libelants.

KRAUSE, LINDSAY & NAHSTOLL,

/s/ GUNTHER F. KRAUSE,

/s/ ALAN H. JOHANSEN,

Proctors for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed September 2, 1960.

[Title of Court of Appeals and Cause.]

No. 17,070

DESIGNATION OF RECORD FOR PRINTING ON APPEAL

The appellant herein, Albina Engine & Machine Works, Inc., does hereby designate the following parts of the record to be printed on appeal herein:

1. Libel in Rem and in Personam for Cargo Damage (Civil No. 9997—Hershey Chocolate Corp. case—Document 1).

2. Answer of Luckenbach Steamship Company, Inc. and Cross-Claim Against Albina Engine & Machine Works, Inc. (Civil No. 9997—Hershey Chocolate Corp. case).

3. Answer of Respondent Albina Engine & Machine Works, Inc. (Civil No. 9997—Hershey Chocolate Corp. case).

4. Answer to Cross-Claim and Cross-Libel Against Luckenbach Steamship Company, Inc. (Civil No. 9997—Hershey Chocolate Corp. case).

(Pleadings in the other consolidated cases are of substantially the same legal effect, except for the respective libelants' allegations as to the time and place of shipment, the nature of the goods shipped, and the amount of the damage sustained, and except for the suit instituted by Zellerbach Paper Company and Northwest Grocery Company (Civil No. 10,002), wherein Albina's "Answer to Cross-Claim and Cross-Libel Against Luckenbach Steamship Company, Inc.," sets forth an additional further answer and second cause of suit, and wherein Luckenbach filed an "Amended Cross-Claim and Cross-Libel of Luckenbach Steamship Company, Inc., Against Albina Engine & Machine Works, Inc., and Answer of Luckenbach Steamship Company, Inc., to Cross-Libel of Albina Engine & Machine Works, Inc." and wherein Albina filed its "Answer of Albina Engine & Machine Works, Inc., to Amended Cross-Claim and Cross-Libel of Luckenbach Steamship Company, Inc." These additional pleadings are designated below as Items Nos. 5, 6 and 7.)

5. Albina's "Answer to Cross-Claim and Cross-Libel Against Luckenbach Steamship Company, Inc." (Civil No. 10,002—Zellerbach Paper Company case).

6. "Amended Cross-Claim and Cross-Libel of Luckenbach Steamship Company, Inc. Against Albina Engine & Machine Works, Inc., and Answer of Luckenbach Steamship Company, Inc., to Cross-Libel of Albina Engine & Machine Works, Inc." (Civil No. 10,002—Zellerbach Paper Company case—Document 14).

7. "Answer of Albina Engine & Machine Works, Inc., to Amended Cross-Claim and Cross-Libel of Luckenbach Steamship Company, Inc." (Civil No. 10,002—Zellerbach Paper Company case).

8. Consolidated Pretrial Order (Document 28).

9. Amendments to Pretrial Order (Document 29).

10. Transcript of Proceedings.

11. Exhibits as follows:

A. Libelants' Exhibit 4. (Certified copy of Police Code, City of Portland, Ordinance No. 16-2527).

B. Libelants' Exhibit 7-A (statement of Smith—used for impeachment).

C. Libelants' Exhibit 7-B (statement of Riley—used for impeachment).

D. Luckenbach's Exhibit 23 (Coast Guard Transcript).

E. Albina's Exhibit 44 (survey report—ship damage).

F. Albina's Exhibit 45 (survey report—cargo damage).

12. Opinion of the District Court (Document 30).

13. Findings of Fact and Conclusions of Law (Document 36).

14. Interlocutory Decree (Document 37).

15. Notice of Appeal and Bond (Documents 38 and 39).

KRAUSE, LINDSAY
& NAHSTOLL,

/s/ GUNTHER F. KRAUSE,

/s/ ALAN H. JOHANSEN,
Proctors for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed September 2, 1960.

No. 17074

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK BRENHA, JR., *et al.*,

Appellants,

vs.

ALFRED J. SVARDA,

Appellee.

APPELLANTS' OPENING BRIEF.

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No. 17074

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Appellee.

APPELLANTS' OPENING BRIEF.

I.

Statement of Pleadings and Jurisdictional Facts.

Plaintiff-appellee filed his complaint in the District Court, alleging that he was a fisherman-cook injured on board a tuna clipper and seeking damages against his employer, based on claims of negligence and unseaworthiness of the vessel. Jurisdiction was founded upon the Jones Act, 46 U. S. Code 688, as to rights based on claims of negligence, and the general maritime law as to unseaworthiness. Trial was by court alone. [T. R. pp. 3-6], and the plaintiff-appellee obtained a judgment. [T. R. p. 22.]

A Notice of Appeal from this judgment was timely filed on May 2, 1960. [T. R. p. 61.]

II.

Statement of the Case.

Plaintiff-appellee was employed as a cook on board the tuna clipper "VIKING", owned by defendants-appellants. On June 28, 1958, the vessel was at sea and the crew was on a school of tuna, and the fishermen were in the fishing racks along the side and stern of the vessel. They were using fishing poles, line and a barbless hook. Plaintiff left the galley and went to the stern of the ship to join the crew. He had his own pole and line. After fishing for a short while and after landing a fish he had caught, the fish hook on his line caught in his eye, resulting in the loss of the eye.

The Court found that one of the chains holding the rack on which plaintiff was standing had given way before the accident; that the rack dropped about four inches; that the dropping of the rack caused plaintiff's position to shift, which in turn caused tension on the fishline, caused the hook to disengage, fly toward the plantiff and strike his eye.

Defendants-appellants contend that the dropping of the rack was not the proximate cause of the fish hook striking plaintiff's eye.

Defendants-appellants submit that the evidence shows that the rack dropped while the fish plaintiff caught was in the air, and before he landed it on deck.

After the rack dropped, plaintiff landed his tuna on the deck of the vessel.

Plaintiff then pulled forward on the pole in order to slide his fish towards him. The purpose of pulling on the pole was to bring the tuna close enough to him so

that he could reach out, grab the slack line, and jerk the hook out of the fish's mouth, or otherwise remove it.

As plaintiff pulled forward on the pole, the hook came out.

The hook did not come out when the rack dropped, nor did the dropping of the rack cause any unusual tension on the line. The hook came out later. The two independent and intervening acts of the plaintiff which were made between the time the rack dropped and the hook came out of the fish's mouth were as follows: first, plaintiff accomplished the landing of the fish on deck by leaning backwards to bring the fish on to the boat, and, second, he then reversed the movement of his body by bending forwards and pulling the pole forward so as to slide the fish along the deck and over to him.

Defendants submit that the dropping of the rack could only have lowered the plaintiff and his pole and thus caused a slack in the line and not a tension. This slack in the line occurred when the fish was in the air and did not cause the hook to come out. To the contrary, the fish was landed safely on deck with the hook still in his mouth. Then when plaintiff made his jerk or pull forward to bring the fish over to him, then and only then did tension occur on the line, and following that tension the fish hook came out and hit the plaintiff.

III.

Specification of Error.

The District Court erred in finding that the parting of the eyebolt of the chain holding the fishing rack on the stern of the "VIKING" was a proximate cause of plaintiff's injury.

The finding of fact in question on this appeal is No. 8 [T. R. p. 17] and is as follows:

> "8. That as a result of the foregoing, on June 28th, 1958, when plaintiff was in the act of catching and landing a fish from the center stern rack of the vessel "VIKING", the eye-bolt on the port side of the rack to which the chain holding the outboard edge of the rack was attached broke and gave way because of its corrosive condition, with the result that the platform of the rack suddenly dropped down, the plaintiff was thrown off balance causing him to partially fall down, and the seaman fishing next to plaintiff fell against him; that the sudden dropping of the rack, the unstable condition of the platform and the plaintiff falling off balance prevented the plantiff from completing the landing of the fish in the normal manner and caused the fish hook to be pulled from the mouth of the fish and to enter the plaintiff's eye.
>
> "That the events from the hooking of the fish until the fish hook entered plaintiff's eye, occupied at most only 2 or 3 seconds of time; that it was during this short interval that the fishing rack gave way that the fish had been landed on the deck when unusual tension occurred on the fish

line; that upon the landing of the fish on the deck the line would ordinarily be slack or under little tension; that the plaintiff's face was turned toward the rear to pull the fish toward him and disengage the hook; that such unusual tension on the fish line caused the hook to disengage from the fish's mouth and fly toward the plaintiff and into the plaintiff's eye; that such unusual tension on the fish line was caused by plaintiff's shift in position in turn caused by the dropping of the fishing rack.

"That at the time the plaintiff was using the proper technique of fishing, and if the rack had not dropped down and the plaintiff had had a stable footing, he would have been able to land the fish in the normal manner and fish hook would not come near the plaintiff's head or his eye; that in the ordinary course of events, when a fisherman is using a proper procedure in the landing and catching of a fish and he is fishing from a stable rack, his own fish hook will not come in the vicinity of or enter his own eye; that the unstable and unsafe condition of the rack from which the plaintiff was fishing proximately contributed to and caused the plaintiff's injury."

IV.
Argument.

SUMMARY: The evidence is without conflict that the alleged dropping of about four inches of the fishing rack, on which plaintiff was standing, happened when plaintiff had a tuna on his line, and plaintiff was bringing the fish from the sea onto the deck of the boat. The fish was in the air, on the hook, when the rack dropped. The hook did not come out of the fish's mouth.

Next, the plaintiff leaned back, using his weight and body to bring the fish in, and he landed the fish on the deck of the boat, which was in back of him.

Then, as the next step, the plaintiff reversed his body movement and leaned forward with the pole, and he pulled or jerked forward with the pole, in order to cause the fish, which was still on his hook, to slide along the deck towards him. At this moment, as plaintiff pulled the fish to him, the hook flew out of the fish's mouth and caught the plaintiff's eye.

The dropping of the rack did not cause the hook to fly out of the fish's mouth. *When the rack dropped, the hook remained in the mouth of the fish.* After the rack dropped, the plaintiff landed the fish on the deck in back of him. The hook was still in the fish when plaintiff voluntarily and intentionally jerked or pulled on the pole in order to bring the fish to him so that he could remove the hook. The hook came out only after he made this jerk or pull on the pole and it was this jerk or pull that created the tension necessary to cause the hook to fly out and strike the plaintiff.

We submit that the effect of the dropping of the rack had spent itself, and was not in fact a cause of

the hook striking the plaintiff's eye. Since the drop of the rack occurred when the fish was still in the air, if it caused the tension which pulled the hook out, the fish would either have fallen back in the sea, or dropped on deck and plaintiff would not have made the jerk or pull to bring the fish over to him; his line would have been free.

A. The Evidence on Proximate Cause.

The only evidence in the record as to the events that led to the accident is in the testimony of plaintiff. [T. R. pp. 159-238.] In analyzing plaintiff's evidence, we will quote his testimony to show that from the time he hooked his fish to the time he was struck in the eye, plaintiff made three distinct operations, which were usual and normal to his method of fishing. The dropping of the rack happened during the first operation, and did not cause the hook to come out of the fish. It had no effect on the second operation of landing the fish, and none on the third of pulling forward on the pole to bring the fish to him.

First. The rack dropped after plaintiff had hooked his fish, and was bringing it into the boat, *the fish being in the air at the time the rack dropped.*

[T. R. p. 209]:

"Mr. Belli: Where was the fish when you felt the rack give way?

The Witness: The fish could have been in the air, sir, because I felt it all at one time, it all happened so fast that just the exact—

Mr. Belli: In the air where?

The Witness: *It would be flying through the air, because I know something gave way underneath me.*

Mr. Belli: Well, you made a motion there. Was the fish in front of you or in back of you *in the air* when it gave way?

The Witness: No, sir, I couldn't tell you just whether the fish would have been in front of me. It was on the pole, sir, I know. That I do know definitely." (Italics added.)

By Mr. Lande:

"Q. What do you mean, it was on the pole? A. *It was in the air . . .*" (Italics added.)

Second: The plaintiff then landed his fish on the deck of the fishing boat, which was in back of him (when fishing, plaintiff faced the sea, with his back to the boat). To accomplish the landing of his fish, plaintiff leaned back with his pole, and brought the small of his back against the stern rail. [T. R. pp. 205-206.]

[T. R. p. 207]:

"Q. All right. Now in this case, at the time you were hurt, you brought your fish back and it hit the deck, didn't it? A. Yes.

Q. *And it hit the deck before the hook came out?* A. *Yes, sir.*" (Italics added.)

Third: After plaintiff landed the fish on the deck in back of him, he then pulled his pole forward in order to slide the fish to him. [T. R. p. 219.] But, *as he moved forward with his pole, the hook flew out of the fish's mouth* and struck him.

[T. R. p. 208]:

"The Court: Now show me in slow motion just how you *landed* this fish. Now go slow.

The Witness: Well, naturally you've got it up in the air, and you put all your pressure—because it's a heavy fish you pour all your weight back. As I brought it in, *I was going to pull it toward me, which I started, and then all of a sudden the hook flew right directly into the eye, sir.* It all happened . . ." (Italics added.)

After the fish was landed on the deck, the plaintiff wanted to pull it towards him,

". . . I was going to pull it toward me, *which I started.* . . ." [T. R. p. 208.]

Only after plaintiff had exerted this pull, or tension on the fish line, did the hook come out of the fish's mouth.

The effect of the rack dropping had spent itself. Plaintiff landed his fish on the deck, with the hook still remaining in its mouth, and then plaintiff made his next usual move.

[T. R. p. 193]:

(Svarda) ". . . just as I pulled forward naturally I'm going to unhook the fish, and then boom. It all just happened so fast."

The unusual thing that happened here was that the hook came out as plaintiff pulled the fish to him; normally, he said:

[T. R. p. 104]:

"Well, you turn around and you pull the fish to you, but you turn around and you reach over the rail and unhook it out of its mouth."

[T. R. p. 194]:

"Q. I see, now what was unusual in the way the hook came out this time as compared to the normal way you would do it? A. Well, sir, the only think I know, as I brought the fish in, and I was leaning *back,* which you have to, to bring it in, and I felt the rack give way, and then the next thing I know *I'm going to pull forward to me* so I can turn around but I'm in that position, and the next thing I know the hook is in the eye." (Italics added.)

Finally, the following testimony of Mr. Svarda concisely shows that after the fish was landed on the deck, he pulled the fish to him and then the accident happened:

[T. R. pp. 209 and 210]:

"Q. Isn't it true that after you got the fish over your shoulder and it hit the deck or came on the deck that you, yourself, then jerked the pole to get the fish loose? A. No., sir, you don't jerk to get the hook loose. You either pull it toward you, or jerk it. *Sometimes it will come out,* but very seldom.

Q. I am talking about the moment of the accident. Immediately prior to the accident didn't you jerk that pole to take the hook out of the fish's mouth? A. No, I couldn't . . . *I pulled the fish toward me, that I know.* But it all happened so fast, sir, its. . . ." (Italics added.)

This movement of pulling the fish to him, which preceded the accident was a usual and normal action by

Svarda. The Court questioned Svarda as to his usual procedure.

[T. R. p. 214]:

"The Court: All right. *But what about after the fish hit the deck?* Do you then follow the practice, when you are fishing with live bait, to jerk the line to get your hook loose?

The Witness: Well, sir, you jerk the line to you, or your pole.

The Court: I don't mean pulling the line up to you. I mean when you land a fish, then do you give it a jerk to take the hook out?

The Witness: No, sir, you'd usually just give a jerk to pull it up toward you.

The Court: You mean you would pull the fish up to you.

The Witness: Yes, sir, you'd pull it toward you, because if it goes the complete length of you—

The Court: You don't try to jerk it; what you're trying to tell me is more of a pull.

The Witness: Yes sir, its more of a pull." (Italics added.)

[Again at T. R. p. 218]:

"The Court: And this pull, after the fish has hit the deck, this pull you talk about to bring the fish toward you is a pull enough to make the fish slide over the other fish on the deck up toward the rail?

The Witness: Yes, sir, toward you.

The Court: And it's not a jerk, with the idea of jerking the hook out of its mouth?

The Witness: Well, sir, I said 'jerk,' but what you normally would do is naturally there is a certain little amount of jerk because you're going to pull, and then you pull it toward you."

[At T. R. p. 219]:

"A. Well sir, the way I do sir, after I land a fish I'll naturally give a little pull, and while I'm doing that I'm turning around and I've got my line and I've got my fish skidding."

At page 232:

"Q. Well, where did the fish go after you pulled it out of the water? A. Well, it came in, I imagine, the rail. I believe so now. It hit the rail, I know. *Anyway, I am back, and the fish is back, and I made a jerk, you know, as you do—you got a tendency to do that, and then boom!* That's all I know." (Italics added.)

At page 234:

"A. Because I was off to one side, *and the fish come in, and I know I gave some kind of jerk* because I wanted to get back, you know, to try to get ahead, and I know the hook flew. That's all I know.

Q. And the hook flew? A. The hook flew and it caught me in the eye. It all happened in a split second, I mean I don't even know.

Q. As you jerked the pole, why did you jerk the pole? A. Well, a lot of times you do when you bring in a big fish, *because you can unhook it.*" (Italics added.)

[Plaintiff had a heavy fish on his hook. T. R. p. 204.]

Plaintiff's own testimony, which is the only evidence on the subject, proves that the cause of the hook flying out of the fish's mouth was the jerk or pull that plaintiff gave his pole.

There isn't the slightest evidence that the dropping of the fishing rack produced or brought about a pull on the fish line and disengagement of the fish hook. Plaintiff testified consistently that only after he pulled on the line did the fish hook come out and hit him.

The trial courts finding of fact, No. 8, is therefore without foundation in the record and is contradicted by the record.

B. The Errors in the Finding of Fact No. 8.

Finding of fact No. 8 contains the findings as to proximate cause. [T. R. p. 17.]

The Court found:

> ". . . that the fish had been landed on deck when unusual tension occurred on the fish line; . . ."

Plaintiff has told in exact words why there was tension on the fish line after the fish had been landed on deck. Plaintiff said, not once, but many times, in answer to questions by his counsel, by the Court, and by counsel for defendants, that he *jerked or pulled the fish to him* and when he did so, the hook flew out of the fish's mouth. [T. R. pp. 208, 210 and 234.]

Plaintiff did not testify, nor is there any other testimony, that the rack dropped *after* the fish was on deck,

and that this dropping of the rack caused him to jerk the line and cause the hook to fly out of the fish's mouth.

There simply is no evidence in the record whatsoever that after the fish had been landed, an *unusual* tension of the fish line occurred. The testimony is squarely to the contrary. Plaintiff created the tension when he pulled on the line in order to bring the fish to him.

The plaintiff leaned back because that was the normal way to use his weight to bring in the fish. When he leaned back, the small of his back was against the stern rail of the boat. [T. R. p. 206.] It was when he was in this position that he claims the rack dropped. Plaintiff says that he fell [T. R. p. 193], *but the fall did not interfere with the landing of the fish on deck, and thereafter plaintiff made his usual pull forward of the fish pole to get the fish to him.*

[T. R. p. 207]:

"Q. Did you have your face turned around in back at all? A. To my right, *naturally,* sir.

Q. As you brought it over your shoulder and the fish hit the deck, you were then in a position where you were laying back. A. Yes sir." (Italics added.)

[T. R. p. 217]:

"The Court: Well, when you say keep your head to one side and not turn your face, do you mean you keep your face to the water?

The Witness: Nor. sir, *you have to turn when you bring them in,* there's a certain amount there, because you've got to see where you're going.

The Court: Well, as you bring your fish in—we'll say you're throwing him over your right shoulder—*your face ordinarily turns a bit to the right* to see that your fish is landed.

The Witness: Yes, sir." (Italics added.)

So the fact that plaintiff's face was turned to the right, in the direction that he landed his fish, and from whence the hook came flying, was a result of his normal procedure, and not caused by any shift in position caused by the rack dropping.

V.
Memorandum of Law.

The burden of proof as to proximate cause is on the plaintiff. Speculation is not sufficient basis for a recovery; substantial evidence on all elements of his case must be offered by the plaintiff.

a. In *Hawley v. Alaska Steamship Co.,* 236 F. 2d 309 (C. A. 9th), this Court of Appeals had before it a case under the Jones Act. The trial court had granted defendant-appellee's motion for judgment of dismissal for insufficiency of the evidence to prove the alleged cause of action. The facts of the case are quite analogous to the present case; plaintiff claimed an unsafe place to work. His argument was as similar to that here; the court failed to apply a "liberal construction" to the definition of negligence as required by the Jones Act.

The Circuit Court Judge Bone writing the opinion, met the plaintiff's argument square on:

"(1) 'A mere scintilla of evidence is not enough to require the submission of an issue to the jury.' " *Gunning v. Cooley,* 1930, 281 U. S. 90, 94, 50 S.

Ct. 231, 74 L. Ed. 720, quoted in *Deere v. Southern Pacific Co.,* 9 Cir. 1941, 123 F. 2d 438, 440, certiorari denied 1942, 315 U. S. 819, 62 S. Ct. 916, 86 L. Ed. 1217; *De Zon v. American President Lines,* 9 Cir., 1942, 129 F. 2d 404, certiorari granted 1942, 317 U. S. 617, 63 S. Ct. 160, 87 L. Ed. 501, affirmed 1943, 318 U. S. 660, 63 S. Ct. 814, 87 L. Ed. 1065, rehearing denied 319 U. S. 780, 63 S. Ct. 1025, 87 L. Ed. 1725. There must be substantial evidence offered by plaintiff to justify submission of the case to the jury. *United States v. Holland,* 9 Cir., 1940, 111 F. 2d 949; *Galloway v. United States,* 9 Cir., 1942, 130 F. 2d 467, certiorari granted 1943, 317 U. S. 622, 63 S. Ct. 437, 87 L. Ed. 504, affirmed 1943, 319 U. S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458, rehearing denied 1943, 320 U. S. 214, 63 S. Ct. 1443, 87 L. Ed. 1851; *Carew v. R. K. O. Radio Pictures,* D. C. D. D. Cal. 1942, 43 Fed. Supp. 199. While the Deere, De Zon and Galloway cases involved motions for directed verdict, and not for dismissal, appellant and appellee concede that the same rules for reviewing the evidence apply to both motions."

The Court quoted from the Supreme Court:

"Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonable possible inferences favoring the party whose causes attacked."

Calloway v. United States, 319 U. S. 372, 395, 63 S. Ct. 1077, 1089.

The Court then refers to the Ninth Circuit case of *Seville v. United States,* 163 F. 2d 296, which was likewise a Jones Act case. The *Seville* case is remarkably similar to the one now before the Court. In the *Seville* case a sling load of supplies hit the plaintiff, here a fish hook hit the plaintiff.

> "Appellant knew that the outward boom tip was not over the center of the sling board and that he would have to move away from the load because it would swing toward him when it was raised. Appellant did not move fast enough to escape the swing and it pushed him backwards causing him to fall. . . ."

The Court held that the seaman had not carried the burden of proof.

The plaintiff Hawley then attempted to argue that inexperienced cannery workers were in the hold with him.

> "He testified that an inexperienced crew 'might have been some help to sustaining the injury I got.' Even assuming that the other men working with appellant were inexperienced, there was an insufficient showing that the *proximate cause* of the injury was the presence of these inexperienced workers." (Italics added.)

The Court said further "The evidence as to *how* the pallet swung and *how* it hit appellant is vague."

In conclusion, the Court said:

> "From all of the testimony, we must agree with the trial court that the evidence was insufficient to take the case to the jury. Appellant's contention here is that under a liberal interpretation of

the Jones Act the lower court should have found sufficient evidence of negligence to send the case to the jury. Our decision in *De Zon v. American President Lines, supra,* 129 F. 2d pages 407-408, is relevant to this contention. We there stated:

"We are reminded by plaintiff that this act 'is to be liberally construed in aid of its beneficent purpose to give protection to the seaman and to those dependent on his earnings' (case cited), but we must also be mindful of the fact that although the Jones Act has given 'a cause of action to the seaman who has suffered personal injury through the negligence of his employer' (citation), still it does not make that negligence which was not negligence before, does not make the employer responsible for acts or things which do not constitute a breach of duty.'

"In *Freitas v. Pacific-Atlantic Steamship Co.,* 9 Cir., 218 F. 2d 562, 564, we said:

" 'The law does not impose upon the shipowner the burden of an insurer nor is the owner under a duty to provide an accident-proof ship. *Lake v. Standard Fruit & Steamship Co.,* 2 Cir., 185 F. 2d 354; *Cookingham v. United States,* 3 Cir., 184 F. 2d 213. In the condition of the record there was nothing other than speculation on which to base a verdict for the plaintiff.' "

In *Miller v. Farrell Lines,* 247 F. 2d 503, the Court of Appeals, Second Circuit, had this to say concerning plaintiff's argument here:

"In a suit under the Jones Act, it is necessary to show that the allegedly negligent act or omission

of the defendant caused, in whole or in part, the damage for which recovery is sought. *Rogers v. Missouri Pacific R. Co.,* 1957, 352 U. S. 500, 77 S. Ct. 443, 459, 1 L. Ed. 2d 493; *Fergusion v. Moore-McCormack Lines, Inc.,* 1957, 352 U. S. 521, 77 S. Ct. 457, 459, 1 L. Ed. 2d 511. The burden of showing this causation rests on the plaintiff. *Johnson v. New York, N. H. & H. R.R. Co.,* 2 Cir., 1952, 194 F. 2d 194, reversed on other grounds, 344 U. S. 48, 73 S. Ct. 125, 97 L. Ed. 77; *Pittsburgh S.S. Co. v. Pala,* 6 Cir., 1933, 64 F. 2d 198. In this case the plaintiff did not introduce evidence of any probative facts to show that the defendant's negligence played any part in Miller's loss of life. The jury was required to indulge in a series of speculations."

VI.
Conclusion.

It is submitted that the evidence shows without conflict that the drop of the fishing rack was not a proximate cause of the fish hook coming out of the fish's mouth and striking the plaintiff; that the District Court erred in so finding, and that the judgment should be reversed.

Respectfully submitted,

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APPELLEE'S REPLY BRIEF.

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APPELLEE'S REPLY BRIEF.

I.

Appellee's Statement of the Case.

Appellants concede that the fishing vessel was unseaworthy and the shipowners were negligent in furnishing the plaintiff an unsafe place to work. The unseaworthiness and negligence consisted of allowing the eyebolt supporting the fishing rack on which the plaintiff was fishing to become so corroded that it failed, with the result that the rack suddenly dropped downward as the plaintiff was landing a fish. The appellants contend, however, that the sudden dropping of the fishing rack, which caused the plaintiff to lose his balance and partially fall down while in the act of landing a fish, was not the proximate cause of the fishhook entering the plaintiff's eye.

The appellants entire point on appeal is that the fish had already been landed on the deck in the normal manner and that the plaintiff was trying to jerk the hood out of the fish's mouth, and it was this act of the plaintiff, and not the sudden collapse of the rack, and the plaintiff's resultant fall which was the proximate cause of his injuries.

The appellants completely disregard the substance of the testimony of all of the witnesses to the effect that the plaintiff was in the act of landing a fish when the rack broke and that he was thrown off balance and partially fell down preventing him from completing the normal procedure in landing the fish. In the normal procedure a fisherman has the pole in a leather pad attached to his belt. When a fish bites, a pulling pressure is applied by the fisherman leaning back against the funnel. As the fish goes over his head, the pole is removed from the pad, the fisherman turns, and the pole is moved in the direction towards which the fish is going through the air so that there is no tension on the line as the fish lands on the deck. [T. R. 281.] The plaintiff was injured when the fish was being landed and the pole was still in his pad. The plaintiff fell over when the rack dropped, his fall putting pressure on the line at a time when it normally would be slack. This tension on the line as a result of the plaintiff's fall pulled the hook from the mouth of the fish into plaintiff's eye.

II.
Argument.

Appellants argue that the plaintiff landed the fish in the normal manner, taking his pole out of the pad as the fish landed on the deck, and that the proximate cause of the accident was the act of the plaintiff in intentionally jerking the line to remove the hook from the fish after it had been landed on the deck. This contention is purely a figment of appellants' imagination.

The evidence in this case is all to the effect that while the fish was being landed and the plaintiff's pole was in his pad, the rack gave way, putting tension on the line at a time when under normal circumstances plaintiff would have removed the pole from the pad and followed the fish toward the boat, releasing all tension. [T. R. p. 188, pp. 274, 278.] The rack gave way and the plaintiff was injured in a matter of seconds. Appellants are endeavoring, by the use of semantics unsupported by the evidence, to avoid their responsibility of furnishing this plaintiff a safe place to work. If a winch driver fell into the winch gear as a result of losing his balance when the working platform gave way, these appellants would argue that there was no causal connection between the failure of the platform and his injury. A fishhook like winch machinery, is dangerous; but if the fisherman, like the winch driver, is furnished a proper and stable place to work, there is little or no danger of injury. To contend that the failure of the working platform, which in either instance can bring the workman in contact with the dangerous

instrumentality—the fishhook or the gear, is factually untenable.

The able Trial Court, commencing on page 386 of the Transcript, in the following language found that the evidence shows the rack failure as the sole and proximate cause of plaintiff's injuries:

> "The Court finds that as this thing happened all of a sudden in a moment or second or so the giving away of the rack caused the situation where increased tension was put on the line, the hook jerked out of the mouth of the fish, plaintiff's face was turned toward the rear, and the hook caught him in the right eye. I don't think that those findings are inconsistent with what the witnesses have said here.
>
> A man engaged in a hazardous occupation knows what he is about, but more the reason that he should be given a safe place to work and not have the hazard of an insecure footing added to the hazards of his occupation.
>
> Within this five-second interval it is not possible for the Court to say exactly when that rack gave way. But obviously there was insecure footing from the time the rack gave way. Nor do we know whether this rack gave way suddenly or whether it took a second or two for the bolt to pull out of the stern of the ship and allow the rack to settle. At any rate, here is a man, with a fish that he landed, on an insecure footing. It could well have been that as he attempted to pull the fish forward the ordinary shifting of weight in attempting to take another motion brought about the situation where he no longer had the secure

footing to stand upon and the tension was put upon the line. This matter of hooking a fish, swinging it back and all is almost like a golf stroke—there is a rhythm of motion, and it requires a safe place for a man to stand who engages in this activity."

A. The Evidence.

The plaintiff testified that the pole was still in the pad at the time of his injury. [T. R. pp. 188, 208.] Edward S. Varley, the defendants' expert, testified that proper fishing technique requires that the pole be removed from the pad before the fish hits the deck so as to avoid having tension on the line. [T. R. p. 274.]

The failure of the rack, the plaintiff's fall and the injury all happened instantaneously while the fish was being landed. Appellants' contention that the fish has been landed in the normal manner and that the plaintiff was injured after completing the normal procedure when he was attempting to remove the hook from the fish's mouth has no support in the evidence.

The plaintiff testified [T. R. p. 192]:

"A. —and as I came back with the fish, it all happened so fast that as I come back, naturally I'm leaning back, and then I just felt like I fell, which I did.

Q. What caused you to fall? A. The rack give down underneath me, and at the same time I'm worrying about the fish and I got it in, naturally I'm going to pull it toward you or jerk it toward you, one or the other, so you can—

Q. With a forward motion. A. Yes, sir—so you can turn around and unhook. Well, at the time it all happened so fast I didn't even know—

the hook flew from its mouth and the next thing I know it's in my eye.

Q. When you say the hook flew from its mouth, when was that event with reference to the time that the staging gave way? A. It all happened together, sir."

[T. R. p. 226]:

"The Witness: Now you've got the fish out of the water, you're coming back, you're leaning back. As you come on back and bring it back, I was like this here, all of a sudden I felt myself go down. I was definitely leaning back. Naturally—

Mr. Lande: All right, now—

The Court: Just don't interrupt.

The Witness: Then there was that jerk on my line, and I'm leaning back like this here, and all of a sudden the next thing I know it's in my eye, and the only thing I know is I hollored out 'Oh God, my eye.'"

In his testimony the plaintiff specifically denied that appellant's contention that jerking the hook from the fish's mouth was the cause of his injury.

[T. R. p. 218, in response to questioning by the Court]:

"The Court: Well, I've been trying to see one of two things now. I've thrown the fish over my shoulder and it has hit the deck. Now I could do many things, but let's take two. I could then pull on the pole to make the fish slide up to the rail so I could disengage it, which would be a pull calculated to slide that fish up where I can grab it.

The Witness: Yes, sir.

The Court: Or my fish has hit the deck and is laying there with a bunch of other fish and I could give the pole a real stiff jerk with the idea in mind of breaking the hook out of its mouth. That's possible.

The Witness: That's possible.

The Court: Is that done?

The Witness: No, sir, normally a man unhooks a fish like that there, if he don't want to unhook it himself he takes his pole and puts it over on top of the bait tank and he jerks up like that and he's got the fish dangling there and then it will break loose and it won't fly like it would any other way."

[T. R. p. 227]:

"Q. No, I asked you whether or not it's true that you jerked the pole of your own intention to get the hook out of the fish's mouth. A. No, sir."

Both the plaintiff and the defendants' expert, Mr. Varley, demonstrated in the courtroom the proper technique of landing fish, which consisted of taking the pole out of the pad and turning around, releasing the tension on the line as the fish lands. [T. R. pp. 274 *et seq.*] Mr. Varley testified that if this proper technique is used, it is impossible for a fisherman to get his own hook in his eye. This testimony, on page 287 of the Reporter's Transcript is as follows:

"Q. If it is done properly by a good fisherman, when the fish is down on the deck, ordinarily and in the usual course of events, the hook does not fly out of that fish's mouth, does it? A. No.

Q. And ordinarily and in the usual course of events when the fish hits the deck the fisherman doesn't pull that hook out of that fish's mouth so that it will come at him, does he? A. No.

Q. As a matter of fact, in the usual course of events and in the normal operation of a one-pole fish of—20 to 30 pounds, I guess, that would be the outside?

The Court: For one pole?

Mr. Belli: Twenty pounds to one pole.

Q. Is that a one-pole fish A. Yes, 20 to 25 pounds.

Q. You have never heard of a man, when the fish gets down on the deck, hooking himself in an eye with his own hook, have you? A. No, I never have."

The sudden falling of the rack threw the plaintiff off balance and (*instead of the pole coming out of the pad it remained therein* and) the fall put tension on the line causing the hook to snap out of the fish's mouth into the plaintiff's eye. Thus, instead of the line being slack when the fish would be landing, tension was put on the line, causing the hook to come towards the plaintiff.

The proximate cause of the injury was the malfunctioning of the fishing rack which precluded the plaintiff from completing the landing of the fish in a normal manner.

B. There Are No Errors in Findings of Fact 8.

The appellants cite a part of a single sentence from this detailed finding as to the manner in which plaintiff was injured. They contend that the finding "that

the fish had been landed on the deck when unusual tension occurred on the fishline" is not supported by the evidence.

In this same finding the Court found that the events from the hooking of the fish until the fishhook entered the plaintiff's eye occupied at most only two or three seconds. The above quoted testimony of the plaintiff is to the effect that the dropping of the rack, the fall and the hook entering his eye all occurred practically instantaneously. Mr. Varley, the defendants' expert, demonstrated in detail the correct procedure of hooking and landing fish [T. R. p. 274, *et seq.*] and stated that if the correct procedure was used, the fishhook would not have come near the plaintiff's head or eye, that when a fisherman is using the proper procedure in the landing and catching of a fish and he is fishing from a stable rack, his own fishhook will not come in the vicinity of his own eye, and that he has never heard of a fisherman getting his own hook in his eye. [R. T. p. 287.] Mr. Varley also testified that as the fish passes over the fisherman's body, the fisherman ceases the tension on the line. [T. R. p. 286.] The plaintiff testified that as he brought the fish in the rack gave way [T. R. p. 194], and the appellant's expert, Mr. Varley, testified that there is only one place for the fish to go after it is brought over the fisherman's shoulder and that is on the boat. [T. R. p. 280.] The ship's captain, A. N. Holbrook, also testified that the fish landed on the deck. [T. R. p. 248.]

The above Finding is amply supported by the evidence.

III.
Memorandum of Law.

A. Findings of Fact Should Not Be Set Aside Unless Clearly Erroneous.

Rule 52(a) of the Federal Rules of Civil Procedure sets forth the well-established rule that findings of fact shall not be set aside unless clearly erroneous. This rule is stated in the case of *Cleo Syrup Corp. v. Coca-Cola Co.* (C. C. A. 8th, 1943), 139 F. 2d 416, cert. den. (1944) 321 U. S. 781, 64 S. Ct. 638, 88 L. Ed. 1074, as follows:

> "This Court, upon review, will not retry issues of fact or substitute its judgment with respect to such issues for that of the trial court. (Citing cases.) The power of a trial court to decide doubtful issues of fact is not limited to deciding them correctly. (Citing cases.) In a non-jury case, this Court may not set aside a finding of fact of a trial court unless there is no substantial evidence to sustain it, unless it is against the clear weight of the evidence, or unless it was induced by an erroneous view of the law. (Citing cases.)" (139 F. 2d at 417-418.)

See also the following:

Nee v. Lynwood Securities Co. (C. A. 8th, 1949), 174 F. 2d 434, 437;

Shapiro v. Rubens (C. C. A. 7th, 1948), 166 F. 2d 659, 665, 666;

United States v. Aluminum Co. of America (C. C. A. 2d, 1945), 148 F. 2d 416, 433.

B. Only Slight Proof of Proximate Cause Necessary.

In maritime law only slight proof of proximate cause is necessary. *The Law of Admiralty*, Gilmore and Back, in discussing "proximate cause", uses the following language, commencing on page 311:

> "The Jones Act plaintiff bears the burden of going forward with evidence on the essential elements of a negligence action: the existence of a duty; the negligent violation of the duty by defendant; and the causal relationship of violation to injury. On the first two issues his burden is lightened by the doctrine of the shipowner's 'higher duty' announced in the Cortes case. On the proximate cause issue his burden is likewise reduced to featherweight by the Supreme Court's development of its own special brand of res ipsa loquitur, which it has described as a rule of 'permissible inferences from unexplained events.' "

and on page 312:

> "It does not seem to be overstating the Johnson case much, if at all, to conclude that plaintiff makes his prima facie case by showing that he was injured and that the injury could have been caused by the negligence of the shipowner (in furnishing defective equipment) or of a fellow crew-member. In a case tried to the court (like Johnson) that is enough to justify the trial judge in giving plaintiff a verdict;" (See *Johnson v. United States,* 333 U. S. 46.)

In the case of *Menafee v. W. R. Chamberlain Co.,* 176 F. 2d 828, it was held that stowing a manila hawser on the vessel's fan tail was the proximate cause

of injuries sustained by a seaman who was injured attempting to clear the hawser from the ship's propeller after it was washed overboard by a storm.

In the case of *Johnson v. Griffiths,* 150 F. 2d 224, the plaintiff seaman was sent forward to investigate a grinding noise being made by the anchor chain. He fell into an open hold and was killed. In the trial court there was evidence of several negligent conditions but the suit was dismissed on the ground that none of them was the proximate cause of the injuries. In reversing the trial court and holding that the proximate cause had been established, the Ninth Circuit Court of Appeals said:

> "It is the duty of a vessel to provide a safe working place for members of its crew. What does it matter which one or how many of the negligent conditions caused the injury? There is evidence that the vessel was anchored in an open roadstead, under blackout conditions with no lights on deck; the weather was freezing and ice and sleet were on the deck; the vessel was pitching heavily; the passageway in the forepeak was obstructed with dunnage and debris; the guard on the steampipe over which the men were required to walk was loose and shaky causing limited visibility from the leaking steam. Under these circumstances the maintenance of an open hatch with no life-line about it constitutes negligence which is so closely related to the injury in this case as to impel the conclusion that it was the proximate cause of the death."

In the case of *Mason v. Lynch Bros.*, 228 F. 2d 709, it was held that the failure of the owners to have a tankerman as a member of the crew was the proximate cause of injuries sustained by a seaman who connected an oil line to a barge, allowed some of the oil to spill onto the deck, and received injuries as a result of slipping and falling on the oiled deck.

In the case of *Ferguson v. Moore-McCormick Lines,* 352 U. S. 521, the plaintiff pantryman had been ordered to serve ice cream to members of the crew. Fellow workmen had forgotten to take the ice cream out of the freezer to allow sufficient time for the ice cream to become soft and pliable, with the result that the scoop he had been furnished would not cut into the frozen ice cream. He attempted to serve the ice cream by using a knife, resulting in an injury to his hand and the loss of two fingers. He was awarded $17,500.00 in the trial court. The Circuit Court reversed the judgment, saying there was no causation or proof of negligence. The United States Supreme Court reversed the Circuit Court, using the following language at page 523:

> "It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident. The jury was instructed that it might consider whether respondent could have anticipated that a knife would be used to get out the ice cream. On this record fair-minded men could conclude that respondent should

have foreseen that petitioner might be tempted to use a knife to perform his task with dispatch, since no adequate implement was furnished him . . . :

> " 'Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.' " (Quoting from *Rogers v. Missouri Pacific Ry. Co.*, 352 U. S. 400.)

The rule of the *Ferguson* case to the effect that it is not necessary that a tortfeasor shall have foreseen the extent of the injury or the manner in which it might occur before liability can be predicated is set forth in *Restatement on Torts,* 1948 Supp., Sec. 435., and was adopted by the Trial Court in its Conclusions of Law. [T. R. p. 20.]

Appellee has more than complied with the rule which requires only slight proof of proximate cause in that the evidence clearly establishes that the failure of the rack was the effective cause of the chain of circumstances which ultimately brought the fishhook in contact with appellee's eye. As the Trial Court so ably stated, the fishing procedure is a rhythmic movement of several phases, the completion of which in this case was prevented by the rack failure.

IV.
Conclusion.

If the plaintiff had been furnished a stable platform from which to fish, he would have landed his fish without incident. The sole and proximate cause of his injury was the unseaworthiness of the vessel and the negligence of the appellants in providing plaintiff a defective fishing rack from which to fish. The judgment should be sustained.

Respectfully submitted,

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No. 17074

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK BRENHA, JR., *et al.*,

Appellants,

vs.

ALFRED J. SVARDA,

Appellee.

APPELLANTS' REPLY BRIEF.

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TABLE OF AUTHORITIES CITED

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APPELLANTS' REPLY BRIEF.

I.

Appellee's reply brief attempts to demonstrate that the dropping of the fish rack prevented plaintiff from taking the fishing pole out of the leather pad attached to his waist and that somehow this caused a tension on the fish line, which in turn caused the hook to come out and strike plaintiff.

The testimony of the plaintiff is squarely to the contrary and does not support the appellee's argument. The appellee refers to testimony of Mr. Varley an expert witness, but plaintiff did not work in the manner described by the expert.

The plaintiff testified that each fisherman had his own way of working [T. R. p. 219], and the plaintiff's style was as follows:

1. Land the fish on deck.

2. Pull forward on the pole to bring the fish to him [T. R. pp. 193, 194, 208, 210, 218, 219 and 234].

3. When the fish has come to him, *then take the pole out of the pad* [R. T. pp. 208, 217] reach over the stern rail of the boat and unhook the fish [R. T. p. 208].

The fish hook came out of the fish's mouth as plaintiff went forward with his pole to pull the fish to him [T. R. p. 208]. Plaintiff never made step 3—the accident to his eye intervened. That is why the pole was still in the pad when the accident happened.

The tension on the fish line was caused by the pull forward, with fish pole in the pad, that plaintiff voluntarily and intentionally made as part of his usual and normal fishing style. The fish hook came out as plaintiff pulled the fish to him [T. R. pp. 208, 210].

One end of the rack had dropped three to four inches, and then held, at a time when the fish was being brought aboard; after which the plaintiff landed his fish on the deck; then he leaned forward, with the pole still in the pad, to slide the fish to him, preparatory to manually unhooking the fish. He did not intend to take the pole out of the pad until the fish had come alongside to where he was standing [T. R. p. 208] but, as he leaned forward and pulled on the fish, the hook flew out and hit him. Thus, the dropping of the rack played no part whatsoever in the happening of the accident and appellants should not be held responsible therefor.

II.

After he had landed his fish on the deck behind him, plaintiff pulled forward to bring the fish to where he

was standing. [This was after the rack had dropped. because the rack dropped when the fish was still in the air, *before* the fish was landed—T. R. p. 209.]

Svarda—[T. R. p. 193]:

"A. The rack give down underneath me, and at the same time I'm worrying about that fish and I got it in, *naturally I'm going to pull it toward you* or jerk it toward you, one or the other, so you can—

Q. *With a forward motion.* A. *Yes, sir*—so you can turn around and unhook. Well, at the time it all happened so fast I didn't even know—the hook flew from its mouth and the next thing I know its in my eye.

Q. When you say the hook flew from its mouth, when was that event with reference to the time that the staging gave way? A. It all happened together, sir.

Q. Did the staging give way first? A. Well, sir, it had to give way first, because I'm going back with it and I'm worried about the fish, *and just as I pulled forward naturally* I'm going to unhook the fish, and then boom. it all just happened so fast."

Svarda—[T. R. p. 194]:

"A. Because once you've got your fish in you turn around anyway *after you go and pull it toward you* and unhook it."

Svarda—[T. R. p. 208]:

"The Court: Now show me in slow motion just how you landed this fish. Now go slow.

The Witness: Well, naturally you've got it up in the air, and you put all your pressure—because it's a heavy fish you pour all your weight back. As I brought it in *I was going to pull it toward me, which I started,* and then all of a sudden the hook flew right directly into the eye, sir. It all happened—

The Court: *Now, where in that sequence did you feel the rack give way?*

Mr. Belli: Where was the fish when you felt the rack give way?

Svarda: *The fish could have been in the air. . . .*"

Svarda—[T. R. p. 210]:

"Q. I'm talking about the moment of the accident. Immediately prior to the accident didn't you jerk that pole to take the hook out of the fish's mouth? A. No.—I couldn't—*I pulled the fish towards me, that I know.*"

Svarda—[T. R. p. 218]:

"The Court: And this pull, after your fish has hit the deck, this pull you talk about to bring the fish toward you is a pull enough to make the fish slide over the other fish on deck up toward the rail?

The Witness (Svarda): Yes, sir, toward you.

The Court: And it's not a jerk, with the idea of jerking the hook out of its mouth?

The Witness: Well, sir, I said jerk, but what you normally would do is *naturally there is a certain little amount of jerk because you're going to pull, and then you pull it toward you.*"

[T. R. p. 219]:

"Svarda: —after I land a fish I'll naturally give a little pull, and while I'm doing that I'm turning around and I've got my line and I've got my fish skidding." (Italics added.)

III.

It was Svarda's style to keep the fish pole in the pad during the time that he was pulling the fish over to him.

Mr. Belli—[T. R. p. 219]:

"Q. Normally when that fish is back over you *and on the deck, when you start to bring it forward to you, is your pole then in the socket or out?* A. No, sir, after you usually make that first pole (pull?), it's—I don't know, sir—*each man has his own style.*

Q. How do you do it? Do you have— A. Well, sir, the way I do, sir, after I land a fish I'll naturally give a little pull, and while I'm doing that I'm turning around and I've got my line and I've got my fish skidding.

Q. Well, is your pole in the socket, then, when you've—"

[T. R. p. 220]:

"A. No, sir, you've taken it out then.

Q. I see. Normally you would take it out after the fish is back there. A. Yes, sir. Yes sir.

Q. But on this it was still in the socket? A. Yes, sir, it was turned at an angle.

Q. Why was it still in the socket? A. Because I had just landed the fish—

Q. Yes. A. And it [I] *was going to go through that motion,* [to pull it toward you or jerk it toward you] *and that's when the hook flew."*

Svarda again testified [T. R. p. 208] that the pole was to remain in the pad during the time he was pulling the fish forward to him:

"Q. Was the end of the pole still in the pad? A. It was at an angle, sir.

Q. But still in the pad. A. It was still in the pad, *because I was going to pull forward.*

Q. You were going to pull forward? A. Yes, sir. Because you see you've got the fish, you're turned around like this here, see, you're going to pull it toward you, *and then* naturally *you take the pole out of your pad when you unhook it* (the fish)."

This testimony shows that *plaintiff did not intend to take the pole out of his pad until he was ready to unhook his fish.* He could not unhook his fish until he had brought it alongside. He had to pull it forward to him to get it in a position so that he could handle it, and when he was making this pull, an act disassociated entirely from the previous drop of the rack, the hook came out of the fish's mouth [T. R. p. 208].

". . . I was going to pull it toward me, *which I started,* and then all of a sudden the hook flew directly into the eye" [T. R. p. 208].

Again, at page 217 of the Transcript of Record, the plaintiff testified that he took his pole out his pad *after* he had went ahead to pull the fish up to him.

". . . naturally you take your pole out of your pad *after you go ahead."* [T. R. p. 217]. (Italics added.)

IV.

We submit that the foregoing testimony of the plaintiff disposes of appellee's argument that plaintiff's fishing style normally called for the removal of the pole from the pad as the fish went over his head. Appellee erroneously argues that plaintiff ordinarily would have removed his pole from the socket in the pad *before* he landed the fish on deck. The above testimony quoted by appellants unequivocally shows that plaintiff kept his pole in his pad *after* he landed the fish, *while* he pulled the fish to him, and only would have removed the pole from the pad when the fish had come alongside and he was ready to unhook it. Of course, this time, as he pulled forward, the hook came out and hit him.

V.

There is absolutely no evidence that when the rack dropped, any tension was put on the line. Appellee makes this bare claim in his brief, and does not cite any testimony in the record in support of the statement.

We submit that we have cited many instances in plaintiff's testimony wherein he states that the pull forward on the line that he made, to pull the fish to him, was the cause of the tension that pulled the fish hook out of the fish's mouth, and the proximate cause of the injury.

VI.

The danger from flying fish hooks is one of the ordinary hazards of fishing with a pole and hook. Commencing at Transcript of Record, page 214, plaintiff testified:

> "The Court: Then what is the ordinary practice? To pull the fish up to the rail to get it out,—

The Witness: Yes, sir.

The Court: —or do you jerk the line to try to get it out of its mouth?

The Witness: Some guys will jerk them, and then some will pull them up—pull them up to you. But usually when you jerk it, it's sort of a hazard —the hook can fly.

The Court: The hooks can fly.

The Witness: Yes, sir.

The Court: And hooks do fly, when you are fishing with bait and land a fish and if your line is jerked the hook will fly.

The Witness: No, sir, not definitely from jerking—

The Court: All right. *But what about after the fish hits the deck?* Do you then follow the practice, when you are fishing with live bait, to jerk the line to get your hook loose?

The Witness: Well, sir, you jerk the line to you or your pole.

The Court: I don't mean pulling the line up to you. I mean, when you land a fish, then do you give it a jerk to take the hook out?

The Witness: No, sir, you'd usually just give a jerk to pull it up toward you.

The Court: You mean, you would pull the fish up to you."

On page 215, Svarda testifying:

"The Court: Now when you have been fishing with live bait, *have there been fish hooks fly around.*

The Witness: *Yes, sir,* there have been hooks already catch men in necks, and other guys squids and that breaking off, sir. *Lots of guys have their heads laid open.*

The Court: *From hooks?*

The Witness: *From hooks. . . .*" (Italics added.)

Therefore, the fact that plaintiff was hit by a hook is not evidence of negligence on one's part.

VII.

There is no liability on the appellants for injury to appellee caused by the usual risks of his calling. The danger of being hurt by a flying fish hook was admitted by appellee, especially when there was a pull or jerk of the fish on the pole.

Svarda—[T. R. p. 214]:

"The Court: —or do you jerk the line to try to get it out of its mouth?

The Witness: Some guys will jerk them, and then some will pull them up—pull them up to you. *But usually when you jerk it, it's sort of a hazard —the hook can fly.*

The Court: The hooks can fly."

[T. R. p. 215]:

"The Court: Now when you've been fishing with live bait, have there been fish hooks fly around?

The Witness: Yes, sir, there have been hooks already catch men in necks, and other guys squids and that breaking off, sir. Lots of guys have their heads laid open.

The Court: From hooks?

The Witness: From hooks. . . ."

The plaintiff did pull or jerk his line immediately before the fish hook came out:

Svarda—[T. R. p. 234]:

"A. Because I was off to one side, and the fish come in, *and I know I gave some kind of jerk* because I wanted to get back, you know, to try to get ahead, and I know the hook flew. That's all I know.

Q. As you jerked that pole, why did you jerk the pole? A. Well, a lot of times you do when you bring in a big fish, *because you can unhook it.*" (Italics added.)

It is therefore submitted that what was involved in this case was the obvious and well known risks in the business of tuna fishing with the use of a hook, line and pole, and there is an absence of negligence in law.

De Zon v. American President Lines, 318 U. S. 660, 671, 63 S. Ct. 814;

Repsholdt v. United States, 205 F. 2d 852;

Roberts v. United Fisheries, 141 F. 2d 288, 293, Cert. den., 323 U. S. 753.

The fall of the rack preceded the accident in time, but was not a cause of it in any manner. Whatever negligence or unseaworthiness may have been present there, the same had no causal relation to plaintiff's acts of landing the fish on deck, then, pulling forward to bring the fish to him, and the hook coming out of the fish when the line was pulled. The lack of proximate cause prevents plaintiff from taking advantage of the fact that one of the rack chains gave way before he was hurt.

Miller v. Farrell Lines, 247 F. 2d 503.

VIII.
Conclusion.

It is respectfully submitted that the judgment in favor of plaintiff should be reversed and judgment ordered to be entered in favor of the defendants.

Respectfully submitted,

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